Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1993

Mary Nagle, James A. Shertzer, S. Enola Gochenauer, Alan Shaffer, Eugene C. Adams, George F. Wilt, Michael E. Wilt, Daniel H. Shertzer, and James A. Shertzer and Daniel H. Shertzer, Executors Under the Will of Elva A. Shertzer, Deceased, and Daniel H. Shertzer, Esquire

Petitioners

vs.

David E. Alspach, Esquire, Trustee in Bankruptcy for Rimar Manufacturing, Inc., Jacques H. Geisenberger, Jr., Esquire, Marvin Krasny, Adelman & Lavine, Adelman, Lavine, Krasny, Gold & Levin, and Rimar Manufacturing, Inc.,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Where the Court of Appeals has imposed sanctions under Federal Rule of Appellate Procedure 38 for failure of counsel to brief two of four reasons assertedly relied upon for the Judgment appealed from, but the District Court's Opinion discusses only two separate reasons, and where the Court has held no hearing or made findings and counsel has been allowed only five days to respond to notice of intention to impose sanctions, have sanctions been imposed in violation of Petitioners' rights under the due process clause of the Fifth Amendment to the United States Constitution?

Where the grounds relied upon for the entry of summary judgment are directly counter to established law and logic, is such judgment so arbitrary and the error so gross and obvious as to deprive Petitioners of property without due process of law?

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Petition

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

Mary Nagle, James A. Shertzer, S. Enola Gochenauer, Alan Shaffer, Eugene C. Adams, George F. Wilt, Michael E. Wilt, Daniel H. Shertzer, and James A. Shertzer and Daniel H. Shertzer, Executors under the Will of Elva A. Shertzer, Deceased, and Daniel H. Shertzer, Esquire,

Petitioners

vs.

David E. Alspach, Esquire, Trustee in Bankruptcy for Rimar Manufacturing, Inc., Jacques H. Geisenberger, Jr. Esquire, Marvin Krasny, Adelman & Lavine, Adelman, Lavine, Krasny, Gold & Levin, and Rimar Manufacturing, Inc.,

Respondents

vs.

Paul R. Rosen, Spector, Cohen, Hunt & Rosen, P.C., Spector, Cohen, Gadon & Rosen, Alan S. Fellheimer, Fellheimer, Krakower & Eichen, Fellheimer, Eichen & Goodman and Robert I. Martin

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Daniel H. Shertzer, Sr. respectfully presents this Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Mary Nagle, James A. Shertzer, S. Enola Gochenauer, Alan Shaffer, Eugene C. Adams, George F. Wilt, Michael E. Wilt, Daniel H. Shertzer, and James A. Shertzer and Daniel H. Shertzer, Executors under the Will of Elva A. Shertzer, Deceased, and Daniel H. Shertzer, Esquire, shareholders and creditors of Rimar Manufacturing, Inc., by their attorney, Daniel H. Shertzer, Esquire, respectfully request that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit filed October 25, 1993, affirming the entry of summary judgment against Petitioners and in favor of Respondents Jacques H. Geisenberger, Jr., Marvin Krasny, Adelman & Lavine, Adelman, Lavine, Krasny, Gold and Levin, and imposing sanctions upon Petitioner-counsel, as violative of their rights under the Fifth Amendment to the United States Constitution.

REFERENCE TO UNPUBLISHED OPINIONS DELIVERED IN THE COURTS BELOW

The Order of the United States Court of Appeals for the Third Circuit was filed on October 25, 1993. The Order affirmed the grant of summary judgment by the United States District Court for the Eastern District of Pennsylvania and imposed sanctions upon Petitioners' counsel in the total amount of twelve thousand, thirty-six dollars ($12,036.00). By Order dated November 9, 1993, the United States Court of Appeals for the Third Circuit amended said Opinion. A copy of the October 25, 1993, Opinion of the United States Court of Appeals for the Third Circuit is attached hereto at Appendix page 1a. A copy of the amendment to the said Opinion is attached at Appendix page 12a. A copy of the Opinion of the District Court for the Eastern District of Pennsylvania appealed from is attached at Appendix page 18a.

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Fifth Amendment to the United States Constitution which states as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 38 of the Federal Rules of Appellate Procedure which states as follows:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the Appellee."

STATEMENT OF THE CASE

On January 12, 1976, Rimar Manufacturing, Inc. filed a Petition in Bankruptcy as a result of the withdrawal of financing by its primary lender, Commercial Credit Business Loans, Inc. (hereinafter C.C.B.L.). Thereafter, C.C.B.L. sued the president of Rimar, Martin, who was also a substantial but minority shareholder of Rimar, on his guarantee of certain of the Corporation's debts to C.C.B.L. Martin counterclaimed contending that C.C.B.L. had deliberately caused the bankruptcy of Rimar, and, after trial, obtained a verdict against C.C.B.L. in the amount of five million dollars. A new trial was subsequently granted because of misconduct of Martin's counsel, but judgment NOV was refused. The claim was eventually settled by the payment to Martin of the sum of one million, seven hundred fifty thousand dollars.

Alspach, the Trustee in Bankruptcy for Rimar, directed his counsel (Respondents herein) to sue C.C.B.L. on the same cause of action as asserted by Martin, but his counsel failed to do so before the running of the applicable statute of limitations on January 12, 1982. However, certain creditors and shareholders of Rimar on January 6, 1982, filed a derivative action in District Court on behalf of the corporation. C.C.B.L.'s objection that the Plaintiffs lacked standing to sue was sustained, and their complaint dismissed, but the Trustee's motion to join under Fed. R.C.P. 17(a) was granted and relation back to the original filing date was allowed. However, on July 9, 1984, upon filing of a motion for summary Judgment by C.C.B.L., the District Court reversed itself and granted summary judgment based upon the expiration of the statute of limitations. (See Appendix.) This Decision was appealed by

the Trustee to the U.S. Court of Appeals for the Third Circuit, but, while the appeal was pending, the Trustee and C.C.B.L. entered into a settlement agreement whereby C.C.B.L. would pay no money to the Trustee but would waive any further recovery from the bankrupt estate. This settlement was approved by the Bankruptcy Court on March 14, 1985. On January 2, 1985, while the Trustee's appeal was pending, the present Petitioners brought this derivative action on behalf of the Trustee and Corporation against the counsel for the Trustee, Geisenberger and Krasny, and Krasny's firms, joining the Trustee and the Corporation as indispensable parties. The Trustee was represented by Geisenberger, while Geisenberger and Krasny each had separate counsel. No appearance was entered for the Corporation. Defendant joined Martin and his attorneys. Some of the Petitioners moved to remove the Trustee for failing to assure that a timely action was brought against C.C.B.L.

The instant action was brought in State Court but removed to Federal District Court by the Defendants pursuant to 28 U.S.C. §1452. The Bankruptcy Judge held a number of hearings on the petitions for removal of the Trustee and for approval of applications to settle actions the Trustee had brought against Martin and Martin's attorneys, including his claim in this action. At the conclusion of the hearings the Court appointed a Special Counsel to review the testimony taken by the Court and make a recommendation. The Special Counsel recommended that the proposed settlement be approved and that the application for removal of the Trustee be denied. The Special Counsel's entire recommendation regarding the removal of the Trustee was as follows:

> "In this case, there is no evidence that the Trustee himself unduly delayed the commencement of litigation.

Rather the Trustee understood litigation would be commenced by counsel." (Appendix p. 51a)

This recommendation was adopted by the Bankruptcy Court without further Opinion (Appendix p. 52a). Applicants in that action appealed to the District Court which affirmed both Orders, and then appealed to the Third Circuit, which likewise affirmed, without Opinion. The entire discussion of removal of the Trustee was contained in the last paragraph of the District Court's Opinion:

> "Moreover, it follows from this Court's agreement with the approval of the settlement that we are likewise in agreement with the Bankruptcy Court's conclusion that the Trustee acted in the best interests of the estate in this matter. We conclude that the Trustee pursued the claims of the estate diligently and sought to minimize expenses while attempting to collect and preserve assets of the estate." (Appendix p. 48a)

The issue of the negligence of Trustee's counsel was not addressed.

In the instant action, in June, 1991, Defendants Alspach, Geisenberger, Krasny, and Krasny's law firms filed motions for summary judgment, which were granted by Opinion filed October 21, 1992. The District Court held that the Trustee's claim against his counsel was barred by the statute of limitations that, in its Decision regarding the removal of the Trustee, it had determined that the Trustee was not negligent, that in approving the settlement of the Trustee's time-barred action against C.C.B.L. it had determined that the estate had not suffered from the Trustee's failure to bring the action timely, and that those two issues were barred by the doctrine of collateral estoppel. In their answering brief before the Court of Appeals, Respondents contended that the District Court

had also found that in its Decision on removal of the Trustee, it had also found that the Trustee's *counsel* were not negligent, despite their having timely failed to bring an action after being directed to do so, and that the District Court found that Plaintiffs had no standing to bring the action.

The case was submitted on briefs to the Court of Appeals on June 10, 1993. On July 16, 1993, the Court issued an order directing attorney for Appellants to give reason why he filed a Notice of Appeal and briefed on behalf of the Trustee, and why he filed a Notice of Appeal on behalf of a prevailing party, Defendant Rimar Manufacturing, and why Appellee should not be awarded damages under Federal Rule of Appellate Procedure 38. At the same time, the Court directed Appellees to discuss whether Rule 38 damages were proper in the Appeal. Both parties were given ten days in which to file letter briefs, and attorney for Appellants was given five days thereafter to reply to Appellees' Briefs on Rule 38 damages.

Appellants' attorney responded that he neither filed a Notice of Appeal nor briefed on behalf of the Trustee, and that Rimar Manufacturing was not a prevailing party in that Appellants were attempting to enforce a cause of action of the Trustee and Rimar Manufacturing against Trustee's counsel. Appellees in their letter brief contended that the District Court Decision was based upon four issues: statute of limitations; collateral estoppel as to damages; collateral estoppel as to the negligence of the counsel to the Trustee; and standing of the Petitioners to bring the action. Attorney for Appellant was permitted only five days in which to respond to the issues raised by Appellees, and his application for enlargement of time was denied.

The Court of Appeals affirmed and concluded that counsel had not addressed two issues decided by the District Court,

therefore the appeal was frivolous, and imposed sanctions on counsel for Petitioners in the total amount of twelve thousand, thirty-six dollars ($12,036.00).

REASONS FOR ALLOWANCE OF THE WRIT

The Petitioners contend that they, as shareholders and creditors of Rimar Manufacturing, on whose behalf they have brought this shareholders derivative action, as well as their counsel, have been deprived of property without due process of law, in violation of the Fifth Amendment to the United States Constitution.

The compelling reasons presented for review to this Honorable Court are whether the sanctions imposed upon counsel gave counsel an adequate opportunity to defend and for a hearing on the record, and whether the affirmance by the Court of Appeals of the entry of summary judgment against the Petitioners was so gross and obvious an error, and departure from settled law, as to constitute a denial of due process.

I.

The Rights Of Petitioners' Counsel Under The Fifth Amendment To The United States Constitution Were Violated By The Erroneous Imposition Of Sanctions, Without Adequate Opportunity To Defend, Hearing, Or Specific Findings

As early as *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 354-355, 20 L.Ed. 646 (1871), in discussing penalties levied against counsel, your Honorable Court said:

> "[T]he power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural

> Justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real or personal property."

The Supreme Court has held that sanctions may not be imposed without affording due process. *Societe Internationale v. Rogers,* 357 U.S. 197, 2 L.Ed. 2d 1255, 78 S.Ct. 1087 (1958). In *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 767, 65 L.Ed. 2d 488, 501, 1 S.Ct. 2455 (1980), the Supreme Court held, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."

It is counsel's contention that he was denied an adequate opportunity to defend against the accusations made against him, as he was provided only five days in which to respond, and was provided no hearing.

Petitioners' counsel was directed to give reason within ten days in a letter brief: a) why he filed a Notice of Appeal and briefed on behalf of the Trustee, b) why he filed a Notice of Appeal on behalf of a prevailing party, Rimar Manufacturing, and c) why Appellees should not therefore be awarded damages under Fed. R.A.P. 38. Counsel responded that he did not file a Notice of Appeal nor briefed on behalf of the Trustee, and that since the action was a derivative one to attempt to recover an asset of the Corporation, the Corporation was not in fact a prevailing party, but rather an aggrieved party.

The Court of Appeals then issued a further Order directing counsel, within five days, again in a letter brief, to explain his reasons "why he did not challenge two of the four independent grounds upon which the District Court based its grant of summary judgment when each of the unappealed grounds

appears individually sufficient to support that judgment." His motion for enlargement of time was denied.

Petitioners' counsel contends that allowance of only five days in which to respond and defend, in a case such as this, is not "ample opportunity of explanation and defense" as required by the Court's Decisions.

A reasoned response required reanalysis of the Opinion in the two cases involving the removal of the Trustee and the settlement of the Trustee's action against other parties, as well as the District Court's Opinion granting summary judgment. Moreover, since no hearing was provided, an adequate response required analysis of the reasonableness of the Respondents' claims for attorney fees. While Petitioners were given ten days in which to respond to the initial charges made by the Court, and Respondents were likewise given ten days to suggest reasons for imposition of sanctions, Petitioners were allowed only five days to respond to the new charges made by Respondents. No reason appears why less time was allowed Petitioners, nor do any exigent circumstances appear. Allowing one day each way for mail delivery, the effective time allowed was only three days, particularly in view of the fact that this action was commenced in 1985, and was stayed by the Court during the proceedings for removal of the Trustee until 1992. Petitioners contend that no reason exists for denying an adequate time for defense.

Rule 38 authorizes the Court to award "just damages." This has been held to include reasonable attorney's fees. *Altwood v. Union Carbide Corp.*, 847 F.2d 278 (5th Cir. 1988). "Reasonable does not necessarily mean actual expenses." *INVST Financial Group v. Chemical Nuclear Systems,* 815 F.2d 391, 404 (6th Cir. 1987). Counsel must mitigate their damages by correlating their responses to the merit of appel-

lant's claim; *INVST, supra; Matter of Yagman,* 796 F.2d 1165 (9th Cir. 1986). For instance the Respondents could have filed, but chose not to file, a motion to quash the appeal which, if it had merits would have avoided the necessity of briefing other issues.

Petitioners' counsel contends that a hearing was necessary to determine the fact issue of the reasonableness of Respondents' claims for fees, Rather than take testimony or remand for testimony, the Court accepted Respondents' affidavits without providing Petitioners' counsel an opportunity to present evidence or to cross-examine witnesses.

The Court here made no findings, unless its conclusory statement that "the district court ruled against plaintiffs for four reasons" may be considered a finding. Findings are necessary in aid of appellate review. *Weisberg v. Webster,* 749 F.2d 864 (D.C. Cir. 1984). In *Braley v. Campbell,* 823 F.2d 1504 (10th Cir. 1987) the 10th Circuit held:

> "[s]ince appeals are based upon alleged errors of law the appellate court's resolution of the merits of an appeal will usually also provide sufficient detail to apprise the attorney and reviewing judges of the basis of the sanctions. Thus, an opinion that analyzes the issues appellant raises and then rejects them by a reasoned analysis necessarily states its findings and its conclusions on the viability of these issues." (832 F.2d at 1514)

The Court here made no analysis of the District Court's Opinion. The Opinion makes no reference to any principles of law or reasoning the District Court relied upon in assertedly determining that the negligence of the Trustee's counsel had been finally litigated favorably to counsel, or that Appellants lacked standing. Petitioners contend that there is little or no support in the District Court's Opinion for these conclusions.

Petitioners also contend that the imposition of sanctions on the counsel requires a finding of bad faith. *Hall v. Cole*, 412 U.S. 1, 36 L.Ed. 2d 702, 93 S.Ct. (1943). *Oglesby v. R.C.A. Corp.*, 752 F.2d 272 (7th Cir. 1985). The Court of Appeals held that the District Court had decided in the proceeding for removal of the Trustee that the Trustee's counsel (as opposed to the Trustee himself) was not negligent, and that the Plaintiffs lacked standing to bring the action for reasons independent of the two reasons for entering summary judgment discussed by Petitioners' counsel in his brief. Petitioners contend that the District Court did not so decide, or at least that there is a reasonable question whether it so decided and therefore Petitioners' counsel's omission in his brief of discussion of those points was neither in bad faith nor a willful abuse of judicial processes.

The Respondents point to nothing in the Opinion of the District Court to support their claim that it found that Petitioners were collaterally estopped from litigating the negligence of counsel. The District Court extensively discussed issue preclusion as to the negligence of the Trustee but was silent as to the negligence of counsel.[1] It held "[t]hus it is clear that the issue whether the estate was injured, as well as the issue whether the Trustee was negligent, were considered and decided in favor of the defendants in connection with our order denying the appeal from the Bankruptcy Court's denial of the application to remove the Trustee." (Opinion p. 22) (Appendix p. 36a)

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[1] Petitioners do not dispute that the negligence of the Trustee was decided favorably to the Trustee in the removal proceedings. The Trustee nonetheless must remain a party since it is essentially his claim against his counsel that Petitioners seek to assert and any recovery would be paid to the Trustee or to the Corporation for distribution.

A review of the pertinent portions of the Special Counsel's report and the Opinion of the District Court in the removal proceedings makes crystal clear that only the negligence of the Trustee was considered and decided. The Special Counsel's entire reference to the issue of the removal of the Trustee was:

> "In this case there is no evidence that the Trustee himself unduly delayed the commencement of litigation. Rather the Trustee understood litigation would be commenced by counsel." (Appendix p. 51a)

This report was adopted without further Opinion by the Bankruptcy Court.

The entire discussion by the District Court on this issue was as follows:

> "Moreover, it follows from this Court's agreement with the approval of the settlement that we are likewise in agreement with the Bankruptcy Court's conclusion that the Trustee acted in the best interests of the estate in this matter. We conclude that the Trustee pursued the claims of the estate diligently and sought to minimize expenses while attempting to collect and preserve assets of the estate." (Appendix p. 48a)

Finally, to accept Respondents' interpretation of the District Court's Opinion, one would have to conclude that both the District Court and the Court of Appeals held that attorneys who have admittedly been directed to file an action and failed timely to do so are, as a matter of law, not negligent. Such a startling departure from settled and basic precedent should not be assumed.

The second issue not addressed by Petitioners was the standing of the Petitioners to bring this action.

Respondents challenged below the standing of Petitioners, contending that the cause of action against his counsel may exclusively be enforced by the Trustee, Petitioners' response was that the Trustee had abandoned that asset of the estate, upon which abandonment it reverted to the corporation, While the District Court acknowledges these arguments, it does not decide them. Rather the Court said:

> "[w]hatever the objective legal merits of this constructive abandonment argument in a proper case, *upon which we make no comment*, it is here unavailing. Our decisions on the other issues in this case confirms the contention of the Trustee and the other defendants that there is no viable asset of the estate for the Trustee to pursue. (Emphasis supplied.)
>
> We conclude, therefore, that whether expressed in the terms of lack of standing or otherwise, the plaintiffs have no right to maintain this action." (Appendix p.40a) (Opinion p. 27)

Respondents did not appeal the District Court's Judgment and *their* argument, not accepted by the Court, is waived. Petitioners' counsel contends that the Court's Decision on standing was not, as contended by Respondents and stated by the Court of Appeals, an independent ground for entry of summary judgment but was, on the contrary, entirely dependent upon the Court's prior conclusion that as the claims against counsel were barred by the doctrine of claim preclusion and the statute of limitations, Petitioners had no standing to pursue a non-existent cause of action. Petitioners contend that their decision not to contest that issue was not frivolous. Indeed, on the contrary, it would have been frivolous on their part to argue that they had standing to pursue a non-existent cause of action.

II.

In Affirming The Entry Of Summary Judgment Where Petitioners' Complaint Was Filed Within Six Months After The Trustee's Timely Action Was Dismissed, Upon Reconsideration, Where The Court, By Necessary Implication, Held That, As A Matter Of Law, Counsel Who Fails To Timely File An Action After Agreeing To Do So Is Not Negligent; Where The Court Held That A Determination Of The Value Of A Cause Of Action After It Had Been Dismissed As Untimely Is Dispositive Of The Issue Of Its Value Before It Was Time-Barred, The Court Of Appeals So Far Departed From Normal And Established Jurisprudence As To Violate The Due Process Rights Of Petitioners

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Petitioners contend that the action of the Court of Appeals in entering summary judgment against their claims was so unreasonable, arbitrary and contrary to settled law as to deny them due process. Respondents admit that they were directed by the Trustee to file suit against C.C.B.L., that they failed to do so within the period of the statute of limitations; that some of the Petitioners brought a derivative action against C.C.B.L. in which the Trustee was substituted and which the Trustee pursued; that summary judgment was subsequently entered against the Trustee based upon the statute of limitations; that within six months after the granting of summary judgment and while that dismissal was still on appeal, the Plaintiffs commenced the within action; that on the identical cause of action in a previously decided case, a shareholder had been awarded a judgment of five million dollars and the case had been settled for one million seven hundred fifty thousand

dollars; and that the Trustee's action against C.C.B.L. was settled while on appeal to the Court of Appeals in return for C.C.B.L.'s waiving its claims against the bankrupt estate amounting to approximately two hundred thousand dollars, Petitioners recognize that the Fifth Amendment does not guarantee a trial devoid of error. However, as the Supreme Court stated in an eminent domain case, *Roberts v. City of New York*, 55 S.Ct. 689, 691, 295 U.S. 265 (1935):

> "In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 63, 70, 55 S.Ct. 316, 79 L.Ed. 761. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

Petitioners contend that in this case, the error is indeed gross and obvious, and a clear violation of Petitioners' due process rights.

Two of the four bases for the Decision of the Court of Appeals' collateral estoppel as to counsels' negligence and standing have been previously discussed. The District Court's Decision on the issues of the statute of limitations and collateral estoppel as to damages are likewise grossly and obviously erroneous.

A. Statute of Limitations.

It is a general and basic proposition of the common law, followed in Pennsylvania, that a cause of action, as here relevant, consists of a tortious act and injury flowing therefrom.

See, e.g. *Mike et al. v. Lian,* 322 Pa. 353, 185 A. 775 (1936). While Respondents' tortious act occurred on January 12, 1982, when the statute of limitations expired, no injury resulted because some of the Petitioners had commenced an action against C.C.B.L. within the period of the statute of limitations, and the Trustee was substituted as Plaintiff in this action, his substitution to relate back to the initial timely filing. It was not until July 9, 1984, when the Court reversed itself and entered summary judgment in favor of C.C.B.L. that any possible injury occurred to the bankrupt estate. This action was commenced January 2, 1985. The District Court's holding, affirmed by the Court of Appeals, that the injury to the bankrupt estate occurred notwithstanding the existence of a valid cause of action, which had been held to be timely, is, Petitioners contend, so unreasonable and arbitrary a departure from normal jurisprudence as to be a denial of due process.

B. Damages.

The District Court held that the Bankruptcy Court's approval of the settlement of the estate's claims against C.C.B.L. after summary judgment had been granted by the District Court in favor of C.C.B.L. was a judicial determination as to the value of the Trustee's claim against C.C.B.L. It is specious argument to contend that the value of a cause of action before it has been dismissed on summary judgment, whether because of the running of the statute of limitations or otherwise, is the same as its value after dismissal. Here, where there were no statute of limitations problems, Martin settled his claim, which was a small part of the whole claim, for one million, seven hundred fifty thousand dollars. After dismissal the value of the claim had shrunk to only two hundred thou-

sand dollars. The conclusion of the District Court affirmed by the Court of Appeals, that the estate, on a matter of law, had not been harmed by the Respondents' counsel's dereliction flies in the face of logic as well as law.

CONCLUSION

The Petitioners, by their counsel, Daniel H. Shertzer, Esquire, respectfully request this Honorable Court grant certiorari in the present case for the reasons above stated.

Respectfully submitted,
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Filed October 25, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1950

MARY NAGLE; JAMES A. SHERTZER; S. ENOLA GOCHENAUER; ALAN SHAFFER; EUGENE C. ADAMS; GEORGE F. WILT; MICHAEL E. WILT; DANIEL H. SHERTZER and JAMES A. SHERTZER and DANIEL H. SHERTZER, Executors under the Will of Elva A. Shertzer, Deceased

V.

DAVID E. ALSPACH, trustee In Bankruptcy for Rimar Manufacturing, Inc.;
JACQUES H. GEISENBERGER, JR.; MARVIN KRASNY; ADELMAN & LAVINE; ADELMAN, LAVINE, KRASNY, GOLD & LEVIN; and RIMAR MANUFACTURING, INC.

V.

PAUL R. ROSEN; SPECTOR, COHEN, HUNT & ROSEN, P.C., SPECTOR, COHEN, GADON & ROSEN; ALAN S. FELLHEIMER; FELLHEIMER, KRAKOWER & EICHEN; FELLHEIMER, EICHEN & GOODMAN and ROBERT I. MARTIN

MARY NAGLE, JAMES A. SHERTZER, S. ENOLA GOCHENAUER, ALAN SHAFFER, EUGENE C. ADAMS, GEORGE F. WILT, MICHAEL E. WILT, DAN H. SHERTZER, and JAMES A. SHERTZER and DANIEL H. SHERTZER, Executors under the Will of Elva A. Shertzer, Deceased and RIMAR MANUFACTURING, INC.,

Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 85-00645)

Submitted Under Third Circuit Rule 12(6)

On June 10, 1993

Before: GREENBERG, NYGAARD

and ROSENN, *Circuit Judges*

(Opinion Filed: October 25, 1993)

DANIEL H. SHERTZER, ESQ.
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Lancaster, PA 17602
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David E. Alspach

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Hartman, Underhill & Brubaker
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Lancaster, PA 17602
Attorney for Appellee
Jacques H. Geisenberger, Jr.

H. ROBERT FIEBACH, ESQ.
JEFFREY S. SALTZ, ESQ.
ERIC A. PACKEL, ESQ.
Wolf, Block, Schorr & Solis-Cohen
S.E. Corner 15th & Chestnut Streets
Packard Building, 12th Floor
Philadelphia, PA 19102
Attorney for Appellees
Marvin Krasny; Adelman & Lavine;
Adelman, Lavine, Krasny, Gold & Levin;
and Rimar Manufacturing, Inc.

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

The plaintiff-shareholders of Rimar Manufacturing, Inc., filed derivative claims for negligence and legal malpractice against Rimar Manufacturing, Inc., Rimar's bankruptcy trustee and his attorneys. They contended that the trustee and his counsel had negligently failed to file a lawsuit on behalf of Rimar within the time permitted by the statute of limitations. The district court granted summary judgment in favor of the defendants on four separate grounds, and plaintiffs now appeal. The plaintiffs, however, challenge only two of the four conclusions reached by the district court which form the basis of its summary judgment. Since they have not challenged two independent bases of the district court's decision, they have waived the opportunity to have them reviewed on appeal and the summary judgment for defendants must stand.[1] Accordingly, we will affirm.

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[1] Additionally, counsel for plaintiffs lists in his notice of appeal that he is appealing on behalf of the *defendant*, Rimar Manufacturing, Inc. We first note the

In addition, when we determined this appeal to be frivolous, we gave counsel the opportunity to address whether damages were appropriate under Federal Rule of Appellate Procedure 38, and if so, in what amount and whether appellants or their counsel should be responsible for paying them. After considering the supplementary material, we find no justification for the frivolous appeal. We will award costs and attorneys' fees to appellees as compensation for defending a frivolous appeal.

I.

The district court ruled against plaintiffs for four reasons. The court found: (1) the shareholders' claims were barred by the statute of limitations; (2) the shareholders were collaterally estopped from relitigating the issue of Rimar's damages; (3) they were collaterally estopped from relitigating the trustee's and his counsel's negligence; and (4) the shareholders lacked standing to pursue their claims on behalf of the bankrupt corporation. Each of the separate grounds is factually supported and legally sufficient to support the summary judg-

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obvious problem that presents itself when counsel for the plaintiff/shareholders unilaterally presumes to file a notice of appeal on behalf of the defendant/corporation. Plaintiffs were represented below by Daniel H. Shertzer, Esq., and defendant Rimar Manufacturing was represented by Wolf, Block, Schorr & Solis-Cohen. Attorney Shertzer has shown no authority to represent Rimar in this appeal, and to the extent his brief purports to do so, it is indeed presumptuous.

Even more fundamentally, judgment by the district court in this case was "entered in favor of all defendants and against the plaintiffs." As a prevailing party, it is settled law that the defendant Rimar cannot appeal from a judgment in its favor. *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 781 (3d Cir. 1975). Yet, Attorney Shertzer makes only the conclusory statement that "the corporation ... is a party to this action [as defendant] and is participating in this appeal." Nowhere does he try to show that Rimar somehow fits into an exception to the general rule barring a prevailing party from taking an appeal. *See, e.g., Delaware Valley Citizens Council v. Davis*, 932 F.2d 256, 263 n.6 (3d Cir. 1991) (recognizing exception where otherwise favorable judgment could have unfavorable collateral estoppel effect).

ment, yet plaintiffs challenge only two in this appeal: the statute of limitations and collateral estoppel on the issue of Rimar's damages.

Under Fed. R. App. P. 28(a)(3), (5), the appellant is required to list the issues raised on appeal and present an argument in support of them. We said in *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991) that "absent extraordinary circumstances, briefs must contain statements of all issues presented for appeal together with supporting arguments and citations." Appellants here do not attempt to argue extraordinary circumstances which might excuse their failure to either list or brief these issues. When an issue is either not set forth in the statement of issues presented or not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal. *Kost v. Kozakiewicz*, 1 F.3d 176, 182-83 & n.3 (3d Cir. 1993); *Institute for Scientific Info., Inc. v. Gordon & Breach Science Publishers, Inc.*, 931 F.2d 1002, 1011 (3d Cir. 1991); 16 Charles A. Wright, et al., *Federal Practice and Procedure* §3974, at 421 (1977 & Supp. 1993, at 690) (issue must be raised in both the issues and argument sections of the brief); *see also Lunderstadt v. Colafella*, 885 F.2d 66, 78 (3d Cir. 1989) (raising issue for first time in reply brief insufficient to preserve for review); *Daggett v. Kimmelman*, 811 F.2d 793, 795 (3d Cir. 1987) (same). Here, appellants completely fail to even mention collateral estoppel and only casually mention standing in one sentence. This is insufficient to preserve the issue for review on appeal. *Simmons* 947 F.2d at 1066; *see Frank v. Colt Indus., Inc.*, 910 F.2d 90, 100 (3d Cir. 1990); *Lunderstadt*, 885 F.2d at 78; *Jackson v. University of Pittsburgh* 826 F.2d 230, 237 (3d Cir. 1987) (citing cases), *cert denied*, 484 U.S. 1020, 108 S.Ct. 732 (1988).

Because the plaintiffs have not contested two of the four independent grounds upon which the district court based its grant of summary judgment each of which is individually sufficient to support that judgment, we must affirm. *See Williams v. Leach* 938 F.2d 769, 772-73 (7th Cir. 1991) (judgment of district court affirmed when only one of two independent grounds supporting it challenged on appeal).

II.

A.

Because this appeal appeared to have been doomed to failure from the moment the plaintiff-appellants' brief was filed in this court, and hence frivolous, we gave counsel for appellees the opportunity to submit a supplemental brief to address whether they should be awarded damages under Fed. R. App. P. 38, and if so, to submit evidence to support the damages they claimed. We gave counsel for appellant an opportunity to respond and contest the propriety of awarding damages and the amount claimed by appellees. Moreover we directed counsel for appellants to give his authority for filing a notice of appeal on behalf of Rimar Manufacturing, Inc., a prevailing party whom he did not represent. Finally, we requested counsel for appellants to give reasons, if any, why damages, if awarded to appellees, should not be assessed against him personally.

Not surprisingly, appellees do contend that they have suffered a loss by virtue of this frivolous appeal and should be awarded compensatory damages under Fed. R. App. P. 38. They also submitted affidavits supporting the amounts by which they had been damaged by the appeal as follows:

1. Wolf, Block, Schorr, Solis-Cohen
fees $8,870.00 + costs $82.50 = $8,952.50

2. Christopher S. Underhill, Esquire
fees $1,334.50 + costs $69.00 = $1,403.50

3. Jacques H. Geisenberger, Esquire
fees $1,740.00 + costs $40.00 = $1,780.00
$12,036.00[2]

Appellants' counsel contends that he did not argue the issue of standing in his brief "because the court's conclusion depended upon the other issues previously discussed in the opinion," and that he did not understand the court to hold that plaintiffs lacked standing to pursue "a viable action against trustee's counsel." (Letter Brief, p.5.) He further asserts that he "intended to discuss briefly at oral argument the two issues [standing and appealing on behalf of a prevailing party who is represented by another] above raised by appellants in their brief." *Id.*

We do not find the district court's rationale to be confusing or ambiguous. It granted appellees summary judgment and stated its reasons for doing so. Appellant's somewhat confusing claim that he misunderstood the district court's opinion is not supported and simply insufficient to excuse his failure to challenge the district court's conclusions.

Moreover, if raising a new issue in a reply brief is untimely and insufficient to preserve an issue for review, *Lunderstadt*, 885 F.2d at 78, then *a fortiori* the mere intention to present new issues at oral argument is untimely and insufficient. We

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[2] Appellants' counsel does not contest these amounts and only argues that trustee's counsel should not be entitled to damages in the form of any fees earned before the notice of appeal was filed. We agree and have deleted all fees and costs generated or incurred before the notice of appeal was filed on December 16, 1992. This figure represents only fees and costs to appellees as a result of this appeal.

point out that an appellate panel may decline to hear oral argument anytime it is "unanimously of the opinion that oral argument is not needed." Third Circuit LAR 34.1(a); *see also* Fed. R. App. P. 34(a).[3] A significant number of cases we decide are submitted on the briefs only. Accordingly, even if presentation of new issues at oral argument were considered timely, it would be a most foolhardy strategy for counsel to pursue. Finally, appellant's counsel offers no explanation why he failed to contest the district court's collateral estoppel conclusion. Appellant presents no reason to excuse his frivolous appeal.

B.

We conclude that damages are appropriate. Fed. R. App. P. 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

The purpose of Rule 38 damages is to compensate appellees, who are forced to defend judgments awarded them in the trial court from appeals that are wholly without merit, and "preserve the appellate court calendar for cases worthy of consideration." *Hilmon Co. (V.I.) Inc. v. Hyatt Int'l* 899 F.2d 250, 251 (3d Cir. 1990). Another important purpose is to discourage litigants from unnecessarily, wasting their opponents' time and resources. *Toscano v. Chandris, S.A.*, 934 F.2d 383, 387 (1st Cir. 1991) (quoting *Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1072 (1st Cir. 1990)). Moreover, even though an appellee makes no request for Rule 38 damages, the court may raise the issue *sua sponte Romala Corp. v.*

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[3] This was no less true under former Third Circuit Rule 12(6), which was in effect when this appeal was filed and submitted.

United States, 927 F.2d 1219, 1225-26 (Fed. Cir. 1991); *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562, 566 (5th Cir.), *cert. denied*, 498 U.S. 970, 111 S.Ct. 438 (1990); *Reis v. Morrison*, 807 F.2d 112, 113 (7th Cir. 1986) (per curiam).

Damages under Rule 38 are appropriate when an appeal is "wholly without merit." *Eg., Quiroga v. Hasbro, Inc.*, 943 F.2d 346, 347 (3d Cir. 1991); *Hilmon*, 899 F.2d at 251; *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986). Our inquiry is an objective one, focusing "on the merits of the appeal regardless of good or bad faith." *Hilmon*, 899 F.2d at 253 (quoting *Sun Ship*, 785 F.2d at 64). The presence of non-frivolous arguments will not save one who files an otherwise meritless appeal from payment of Rule 38 damages. *See In re Perry*, 918 F.2d 931, 934-35 (Fed. Cir. 1990), *cert. denied*, 112 S.Ct. 49-50 (1991).

Here, appellants challenged only two of the four conclusions asserted by the district court to support its summary judgment for defendants. Hence, even if we held for appellants on both asserted allegations of error, two unchallenged bases would remain, and we would still affirm the district court's judgment This appeal therefore never had any possibility of resulting in a reversal and is frivolous. *See Toscano*, 934 F.2d at 387; *Romala Corp.*, 927 F.2d at 1222 (discussling *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1578-80 (Fed. Cir. 1991)).

We are well aware that injudicious awards of Rule 38 damages may have the potential to chill the zeal for pursuing novel questions and difficult appeals. *See Hilmon*, 899 F.2d at 253. As the *Finch* court pointed out, sometimes a questionable appeal may be due to mere overzealousness or inexperience of counsel, and it is sometimes difficult to draw the line "between the tenuously arguable and the frivolous." *Id.* at 1578.

Hence, we move with caution and will not label an appeal frivolous unless it lacks colorable support or is wholly without merit. Here, however, there was no possibility of success, and it is patently unfair to allow appellees who have been damaged financially by a frivolous appeal to go uncompensated. We see no chilling effect whatsoever in requiring an attorney, once a proper decision to appeal has been made, to be professional and diligent in prosecuting it. Indeed, any other rule would prejudice the very clients whose interests the attorney is duty-bound to protect, and who properly rely on their attorneys to zealously advocate their causes.

C.

We also believe it is appropriate to impose the burden for payment of these damages upon appellants' counsel rather than on the appellants. In *Hilmon*, we held that the burden for payment of Rule 38 damages may be imposed upon counsel for appellant when the frivolous appeal stems from counsel's professional error. 899 F.2d at 253-54; *see also Quiroga*, 943 F.2d at 347. Appellants' counsel has offered no reason to show that the fault for the frivolous appeal lies anywhere but with him. Moreover, it is inconceivable that appellants would request that their attorney not challenge alleged errors when the failure to do so would result in a certain loss. In *Hilmon*, we set the standard that

> attorneys have an affirmative obligation to research the law and to determine if a claim on appeal is utterly without merit and may be deemed frivolous. We conclude that if counsel ignore or fail in this obligation to their client, they do so at their peril and may become personally liable to satisfy a Rule 38 award. The test is whether, following a thorough analysis of the record and careful

research of the law, a reasonable attorney would conclude that the appeal is frivolous.

899 F.2d at 254.

Appellants' counsel should have known that unless all four conclusions reached by the district court in support of its summary judgment were challenged, the appeal he filed had no chance whatsoever of success. It is manifestly evident that the responsibility for paying these damages rests squarely upon counsel.

III.

Because the grounds asserted by plaintiffs are insufficient to overturn the district court's summary judgment in favor of defendants, we will affirm that judgment. Because this appeal was frivolous and the fault of counsel, we will impose damages in the total amount of $12,036.00, payable by appellants' counsel as follows to:

1. Wolf, Block, Schorr, Solis-Cohen $8,952.50
2. Christopher S. Underhill, Esquire $1,403.50
3. Jacques H. Geisenberger, Esquire $1,780.00

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 85-00645)

Submitted Under Third Circuit Rule 12(6)
On June 10, 1993
Before: GREENBERG, NYGAARD and ROSENN, *Circuit Judges*
(Opinion Filed: October 25, 1993)

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Attorney for Appellees
Marvin Krasny; Adelman & Lavine;
Adelman, Lavine, Krasny, Gold & Levin

ORDER AMENDING OPINION

It is hereby ordered that the Court's Opinion be corrected as follows:

On page 2, Jacques H. Geisenberger, Jr., Esq., 45 East Orange Street, Lower Level, Lancaster, PA 17602-2846, should be listed as Attorney for Appellee David E. Alspach, Trustee in Bankrutcy for Rimar Manufacturing, Inc., and Rimar Manufacturing, Inc.

On page 3 of the opinion, under H. Robert Fiebach, Esq., Jeffrey S. Saltz, Esq., Eric A. Packel, Esq., of Wolf, Block, Schorr & Solis-Cohen, the last line "and Rimar Manufacturing, Inc." should be deleted.

In footnote 1, the final sentence should read "Plaintiffs were represented below by Daniel H. Shertzer, Esq., and defendant Rimar Manufacturing, Inc. by its Trustee in Bankruptcy, David E. Alspach, was represented by Jacques H. Geisenberger Jr., Esq. Attorney Shertzer has shown no authority to represent Rimar, Inc. in this appeal, whose interests throughout have been represented by and through its Trustee,

David E. Alspach, and to the extent his brief purports to do so, it is indeed presumptuous."

By the Court

/s/ Richard L. Nygaard
Circuit Judge

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET

PHILADELPHIA, PA 19106-1790

P. DOUGLAS SISK, CLERK
TELEPHONE 215-597-2995

July 29, 1993

Jacques H. Geisenberger, Jr., Esq.

Christopher S. Underhill, Esq.

Daniel H. Shertzer, Esq.

Jeffrey S. Saltz, Esq.

Re: Nagle v. Alspach

No. 92-1950

Dear Counsel:

Attorney for the appellant has been granted five (5) days in which to reply to appellee's brief. In that reply he may also explain his reasons, tactical or legal, if any there be, why he did not challenge two of the four independent grounds upon which the district court based its grant of summary judgment when each of the unappealed grounds appears individually sufficient to support that judgment. His motion for enlargment of time is denied.

Very truly yours

P. DOUGLAS SISK, Clerk
/s/Pamela Lester, Deputy Clerk

PDS:pl

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
P. DOUGLAS SISK, CLERK
TELEPHONE 215-597-2995

July 16, 1993

Jacques H. Geisenberger, Jr., Esq.

Christopher S. Underhill, Esq.

Daniel H. Shertzer, Esq.

Jeffrey S. Saltz, Esq.

Re: Nagle v. Alspach

No. 92-1950

Dear Counsel:

The parties are directed to file letter briefs addressing the following:

1. Attorney for appellants is directed to give reason why he filed a notice of appeal and briefed on behalf of the trustee when he did not represent the trustee;

2. Attorney for appellants is directed to give his authority, if any there be, for filing a notice of appeal on behalf of a prevailing party, defendant Rimar Manufacturing;

3. Attorney for appellants is directed to give reasons, if any there be, why appellees should not be awarded damages under Federal Rule of Appellate Procedure 38;

4. Attorneys for appellees are directed to discuss whether Rule 38 damages are proper in this appeal, and if so, to submit documentary data to the court to substantiate an appropriate amount to be awarded and to whom;

5. Attorney for appellants is directed to give reasons, if any there be, why damages, if awarded appellees, should not be assessed against him personally, or conversely, why if awarded, they should be imposed upon appellants.

Jacques H. Geisenberger, Esq.
Christopher S. Underhill, Esq.
Daniel H. Shertzer, Esq.
Jeffrey S. Saltz, Esq.
July 16, 1993
PAGE TWO - CONTINUED

Briefs on the above items shall be filed within ten days of the date hereof. Attorney for appellants shall have five days thereafter to reply, if he wishes to do so, to appellees' briefs on item No. 4 above.

Very truly yours,
P. DOUGLAS SISK, Clerk
/s/Pamela Lester, Deputy Clerk

PDS:pl

FILED Oct. 20, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 85-0645

MARY NAGLE, JAMES A. SHERTZER, S. ENOLA GOCHENAUER, ALAN SHAFFER, EUGENE C. ADAMS, GEORGE F. WILT, MICHAEL E. WILT, DANIEL H. SHERTZER, and JAMES A. SHERTZER and DANIEL H. SHERTZER, Executors under the Will of ELVA A. SHERTZER, Deceased

Plaintiffs

vs.

DAVID E. ALSPACH, ESQ., Trustee in Bankruptcy of RIMAR MANUFACTURING, INC., JACQUES H. GEISENBERGER, JR., ESQ. MARVIN KRASNY, ADELMAN & LAVINE, ADELMAN, LAVINE, KRASNY, GOLD & LEVIN, and RIMAR MANUFACTURING, INC.,

Defendants

TROUTMAN, S.J.

MEMORANDUM

The above-captioned case is the last in a series of adversary proceedings and appeals arising out of the bankruptcy of Rimar Manufacturing, Inc. Plaintiffs are shareholders of the debtor corporation and defendants are the Trustee in Bankruptcy and his counsel.

The factual background of this case was set forth in detail in *In re: Rimar Manufacturing, Inc.*, No. 88-9048, slip op. at

2—6 (E.D. Pa. July 31, 1990); *aff'd*, 928 F.2d 396 (3d Cir. 1991), an appeal by the shareholders of Rimar, the same parties who are plaintiffs in this action, from orders of the Bankruptcy Court which denied their motion to remove the Trustee and his counsel and granted the Trustee's motion to settle two lawsuits.

Since the issues in the prior appeal and in this action are identical with respect to the conduct of the Trustee and his counsel, we will here briefly repeat the underlying scenario, with reference to our prior opinion.

Many years ago, Robert Martin, founder and principal shareholder of Rimar, was operating Rimar with credit extended by Commercial Credit Business Loans, Inc., (CCBL). (Slip op. at 2). After the business relationship between Martin and CCBL deteriorated, Rimar was allegedly forced into bankruptcy and Martin commenced an action against CCBL, which was ultimately settled. (*Id.*). Additional problems, however, led to a subsequent lawsuit by CCBL against Martin, in which Martin asserted a counterclaim against CCBL, alleging that it had deliberately violated the stipulation of settlement which ended the prior lawsuit, and that it did so with the specific intent and effect of injuring Martin. (Slip op. at 3).

After a trial on the merits in 1979, the jury returned a verdict in favor of Martin on the claim against him by CCBL, and on his counterclaim against CCBL, in the amount of five million dollars. (*Id.*). The jury award, however, never became a collectible judgment. The trial judge granted CCBL's motion for a new trial, ruling that the pervasive misconduct of Martin's counsel must have affected the verdict. Ultimately, the counterclaim case settled for substantially less than the amount awarded by the jury. (*Id.*).

The jury's verdict, tainted though it might have been, has nevertheless haunted the bankruptcy case, which was commenced in 1976. The plaintiffs in this case, additional shareholders of Rimar, the debtor corporation, have served as mediums determined to keep the specter of the counterclaim verdict glimmering in the background of the bankruptcy proceedings. Their insistence that the Rimar estate had been disadvantaged by CCBL resulted, indirectly or directly, in the filing by the Trustee of two cases on behalf of Rimar, this action against the Trustee and his counsel, and the appeal from the order of the Bankruptcy Court permitting the settlement of both of the Trustee's cases and refusing to grant the Rimar shareholders' application to remove the Trustee and his counsel.

The two cases filed by the Trustee, and ultimately settled, alleged claims against Martin, counsel for Martin and counsel for Rimar, based upon their failure to notify the Trustee of the litigation between Martin and CCBL before the Trustee made certain concessions to CCBL, including acknowledging CCBL's security interests in some estate assets. (Slip op. at 4, 5). In addition, in May, 1981, the Trustee had sought and obtained permission from the Bankruptcy Court to bring an action against CCBL, apparently upon the same theory as the suits which were filed by the Trustee against Martin, his counsel and Rimar's counsel. No action, however, was ever commenced by the Trustee against CCBL on any theory of liability.

Both the Trustee and the Rimar shareholders had become convinced that the statute of limitations on a potential claim by Rimar against CCBL similar to Martin's counterclaim against CCBL would run on January 12, 1982. When the Trustee had not commenced such an action by early January,

1982, the Rimar shareholders who are plaintiffs in this case filed a lawsuit in the district court against CCBL, in which the Trustee subsequently attempted to intervene and was ultimately substituted for the plaintiffs. (Slip op. at 6).[1]

Eventually, the district court granted CCBL's motion for summary judgment in Nagle I based upon the Trustee's failure to either commence or join in that action before January 12, 1982, the date, as everyone agrees, on which the statute of limitations ran on Rimar's claim against CCBL. (*See,* Motion of Defendants Marvin Krasny, Adelman & Lavine, and Adelman Lavine, Krasny, Gold and Levin for Summary Judgment, Doc. #37, Exh. A). Notwithstanding the summary judgment entered in favor of CCBL in Nagle I, the Trustee negotiated a settlement with CCBL whereby CCBL agreed to withdraw its claim against Rimar in the bankruptcy case. The Trustee then obtained permission from the Bankruptcy Court to compromise Rimar's claims in Nagle I on that basis. The Bankruptcy Court's order of March 15, 1985, permitting that settlement was never appealed.

In the meantime, in January, 1985, the Rimar shareholders commenced this action against the Trustee and his counsel, alleging that the defendants were negligent and, consequently, had committed legal malpractice by failing to file an action against CCBL within the applicable statute of limitations.

In March, 1985, the same shareholders who are plaintiffs in this case filed an application in the Bankruptcy Court to remove the Trustee and his counsel, based, *inter alia,* upon their failure to file an action against CCBL within the applica-

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[1] That action was docketed in the district court at 82-0046 and has generally been designated "Nagle I".

ble limitations period. (See, Motion for Summary Judgment of Jacques Geisenberger, Doc. #38, Exh. A).[2]

Subsequently, on February 12, 1986, the plaintiffs/petitioners renewed and expanded their March, 1985, application to remove the Trustee, which the Bankruptcy Court had earlier declined to consider, terming it premature. In order to resolve the substantive issues underlying the additional request to remove the Trustee, the Bankruptcy Court later appointed Special Counsel to the Trustee to investigate the reasserted bases for the request, as well as the new objections of the petitioners to the Trustee's application for leave to compromise the claims against Martin, his counsel and Rimar's pre-bankruptcy counsel, which were still pending in this Court.

By order of August 29, 1988, the Bankruptcy Court adopted the Report and Recommendation of Special Counsel as the Findings of Fact and Conclusions of Law of the court and, as previously noted, approved the settlement and declined to remove the Trustee and his counsel. As also noted, the Bankruptcy Court's order was affirmed by this Court and by the Court of Appeals.

Action on this case was suspended during the Bankruptcy Court's investigation and consideration of the application to remove the Trustee and of the objections to the settlement of the two cases, both of which issues were pressed by the Rimar

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[2] In their initial application to remove the Trustee, as well as in a later application, the petitioners raised the issue of the difficulty and unlikelihood of the Trustee pursuing an action for malpractice against his counsel based on counsel's failure to file a timely action against CCBL. Thus, the issue of the negligence of the Trustee and his counsel in failing to sue CCBL was indirectly raised. (*See*, Doc. #38, Exh. A, B). As will be discussed in more detail, *infra.*, however, the decisions of both the Bankruptcy Court and this Court concerning whether the Trustee should be removed involved careful and detailed consideration of the effect on the Rimar estate of the failure to timely sue CCBL.

shareholders who are the plaintiffs in this case. During the pendency of the appeal to the Third Circuit of those matters, discovery was undertaken in this action, and upon completion thereof, all defendants filed motions for summary judgment, now before the Court for disposition.

There are three principal bases for summary judgment, asserted by one or more of the moving defendants: (1) The action is barred by the statute of limitations; (2) the claim against the defendants is barred by *res judicata;* (3) The plaintiffs lack standing to prosecute claims on behalf of the Rimar bankruptcy estate. We will discuss these legal issues *seriatim.* Plaintiffs have not demonstrated that there are any material issues of fact in dispute with respect to these contentions of the defendants.

1. Statute of Limitations/Accrual of a Cause of Action

As noted, the date on which the statute of limitations expired on the claim of the Rimar bankruptcy estate against CCBL, January 12, 1982, is not disputed. Defendants, therefore, contend that since the statute of limitations applicable to a legal malpractice claim against them is two years, the period in which plaintiffs could assert their claim expired on January 12, 1984. Consequently, defendants further contend that this action, filed in January, 1985 and removed to this Court on February 1, 1985, is barred by the statute of limitations.

Plaintiffs argue that application of the "discovery rule" under Pennsylvania law tolled the statute of limitations until the plaintiffs knew, or reasonably could have known, that they suffered an injury and the cause thereof. *See, Garcia v. Community Legal Services Corp.*, 524 A.2d 980 (Pa.Super. 1987). Plaintiffs further argue that such discovery of a cause of action against the defendants could not have occurred before July 10, 1984, the date on which the district court granted summary

judgment in favor of CCBL in Nagle I on statute of limitations grounds.

It is apparent, however, from the plaintiffs' arguments that there is an additional issue involved. In one sense, the relevant question is not when did plaintiffs discover that they had been injured but rather, when did a cause of action for legal malpractice accrue, *i.e.*, when did the alleged injury actually occur?[3] Framing the issues in those terms clarifies the plaintiffs' argument that they had no reason to know of an injury to the bankruptcy estate until summary judgment was granted in favor of CCBL in July, 1984, which is based upon plaintiffs' contention that they could not have commenced a legal malpractice action before any damage was sustained by the estate. Plaintiffs further contend that such damage did not occur until judgment was entered in favor of CCBL. Thus, plaintiffs are not really contending that they could not have discovered their injury before July 10, 1984, but rather that their claim did not accrue until then. Plaintiffs conclude that, because they had two years from July 10, 1984 in which to bring an action, and because they commenced this suit early in 1985, it is timely.

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[3] As noted in *Pounds v. Lehman*, 558 A.2d 872 (Pa.Super. 1989), the Pennsylvania "discovery rule" is applied in two related, but distinct contexts with respect to statute of limitations questions.

In its purest form, the discovery rule serves to "excuse or toll, for equitable reasons the period of time in which an individual is reasonably unaware that an actionable injury has been sustained." *Id.*, at 873.

At times, however, the discovery rule is invoked as a means of determining when a cause of action accrues for statute of limitations purposes, *i.e.*, when the actionable injury occurred in order to determine when the limitations period began to run. Thus, it is not inaccurate for plaintiffs to invoke the discovery rule, but we note that it appears that plaintiffs have, by their arguments, involved both applications of the rule in the statute of limitations question here presented.

This analysis, however, can only preserve the plaintiffs' claims if we adopt plaintiffs' underlying, albeit unarticulated, resort to 20/20 hindsight on a selective basis.

It is clear that any injury which plaintiffs could allege against the Trustee and his counsel occurred on January 12, 1982. When that date passed without a suit against CCBL by the Trustee, the plaintiffs had reason to know that the Rimar estate had been injured, since they admittedly believed that the statute of limitations had passed on any potential contract claim against CCBL on behalf of Rimar. Thus, on January 12, 1982, plaintiffs reasonably believed the estate had been injured since any such claim by the Trustee on behalf of the Rimar estate was barred, and, therefore, plaintiffs' claim accrued. *See, Sherman Industries, Inc. v. Goldhammer,* 683 F.Supp. 502, 508 (E.D. Pa. 1988): "As a general rule, 'a cause of action arises or accrues ... when the plaintiff could have *first* maintained the action to a successful conclusion.' " (Citations omitted); (Emphasis added). Although it is true that the Rimar shareholders had themselves filed such a claim prior to January 12, they were also aware, or should have been aware in the exercise of due diligence, that their standing to pursue that claim on behalf of a debtor corporation was tenuous at best.[4] Thus, plaintiffs could reasonably expect that, absent the Trustee's involvement, their suit was subject to dismissal or summary judgment on procedural grounds.

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[4] We here take notice of the fact that one of the named plaintiffs is the attorney of record for the plaintiffs in this action, and was likewise their attorney in Nagle I. (*See*, Doc. #37, Exh B at 31). Since one of the plaintiffs is an experienced attorney, thoroughly familiar with all aspects of the litigation, plaintiffs cannot expect to claim the status of lay persons, unschooled in the law, who might not have understood the posture of their case or the implications of motions, orders or other legally significant events which occurred as their case progressed.

On January 12, 1982, the plaintiffs had no more reason to know or believe that the Trustee would seek to intervene in their pending case, or that the trial court would permit substitution of the Trustee as plaintiff, than they had reason to know or believe that the trial court would still later determine that the Trustee's subsequently asserted claim in Nagle I was time-barred. Consequently, the plaintiffs cannot now argue either that they had no claim on January 12, 1982, or that they could not have discovered the injury to the estate or its cause on that date because of the Trustee's later entry into the case.

When, by order of court, the Trustee took over the litigation as the substituted plaintiff, the claims of the plaintiff shareholders against the Trustee and his counsel for losses to the estate resulting from his failure to timely commence suit appear to have been eliminated, as plaintiffs implicitly recognize in their argument that there was no damage to the estate prior to July 10, 1984, because of the Trustee's substitution as plaintiff in Nagle I.

If a claim against the Trustee and his counsel based upon their failure to commence an action against CCBL was, indeed, obviated by the Trustee's entry into the shareholders' existing action, the further question arises whether the original claim, or a new claim, against the Trustee and his counsel for losses to the Rimar estate emerged or accrued on July 10, 1984, the date of the decision in Nagle I that the action by Rimar against CCBL was untimely. In other words, we must here determine whether a rejuvenated cause of action could arise, phoenixlike, from the ashes of an apparently extinguished claim when a later event confirmed that an injury resulting from prior conduct still existed, notwithstanding an intervening period of time during which it appeared that the injury had been abated.

It is clear that the Trustee's failure to timely file suit against CCBL caused the alleged injury upon which the claim is based and occurred long before the injury was confirmed by the summary judgment order. As noted in *Garcia*, a court decision such as the summary judgment order here involved merely serves notice that defendants' prior conduct resulted in injury. In this case, however, there is a complicating factor since a previous decision by the same court appeared to have eliminated the injury and/or its effects before the statute of limitations expired on a resulting claim. The later reversal of that decision after the statute of limitations expired on the plaintiffs' claims against the defendants revealed, however, that the Trustee's failure to file suit against CCBL by January 12, 1982 was still capable of damaging the Rimar estate. Consequently, plaintiffs seek to invoke the doctrine of equitable tolling in a uniqe* context, arguing that they had no damages, and, hence, lacked an essential element of their cause of action until they received notice of the decision in Nagle I that Rimar's claims against CCBL were time-barred.

Neither the Court's own research nor any relevant case-law cited by the parties suggests that the Pennsylvania discovery rule operates to preserve a cause of action under these circumstances. Unlike the situation in *Garcia*, the alleged injury in this case was both real and ascertainable on the date that the statute of limitations expired on Rimar's contract claims against CCBL. Moreover, plaintiffs in this case were well aware of both the alleged injury and its cause on that day. Although they may have later believed that the injury had been eliminated, and, therefore, that a cause of action no longer existed due to their reliance upon a court decision which was later reversed, we find no basis for reactivating a stale claim for that reason. The discovery rule in Pennsylvania does not apply in situations such as this, where the existence of a cause

of action, rather than the existence of the injury itself, is established or clarified beyond the limitations period. *Urland v. Merrell-Dow Pharmaceuticals*, 822 F.2d 1268 (3rd Cir. 1987). Rather, it is applicable only when the plaintiff could not, in the exercise of due diligence, discover the injury or the relationship between the injury and the conduct which produced it before the statute of limitations expired. *Id.*

Moreover, if we were to extend the parameters of the discovery rule as plaintiffs here seem to request, and hold that Pennsylvania's two year statute of limitations for tort actions begins to run anew whenever a court decision appears to affect the quantum of harm apparently caused by an injury after it is established, as here, that the injury itself occurred, and the plaintiffs were actually aware of it at the time it occurred, the limitations period would be subject to virtually infinite extensions, and would be rendered meaningless.[5]

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[5] In this case, the issue of the existence of an actionable injury at various times was affected by conflicting court decisions in the underlying action upon which the instant malpractice case is based. This circumstance tends to cloud the real statute of limitations issue presented by the plaintiffs' arguments that they were unable to discover their alleged injury until after the second court ruling, as well as the principle underlying our determination that the discovery rule under Pennsylvania law cannot generally be applied to resuscitate claims based upon collateral court decisions which appear to affect an element of a cause of action.

Reference to a hypothetical situation may better illustrate the basis for our decision that subjecting the statute of limitations to the vagaries of changes in the law, even the law of a particular case, would vitiate its utility.

In considering whether a personal injury action should be brought, *e.g.*, a plaintiff might very well be convinced that such a claim would be subject to dismissal or summary judgment based upon court decisions which indicate that he cannot sufficiently allege or prove an essential element thereof, such as damages. Such plaintiff, therefore, may decide that attempting to pursue his claim in court would be futile.

If the Pennsylvania Supreme Court later reverses itself, or reverses a lower court decision, or otherwise clarifies the measure of damages or the quantum of evidence necessary to reach a jury on the potential claim, so that it then appears

Consequently, we agree with defendants' contention that plaintiffs' claims against them were untimely filed. Although defendants are entitled to summary judgment on that basis alone, we will nevertheless address the remaining bases for judgment asserted by defendants.[6]

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that plaintiff's claim is actionable after all, he obviously could not pursue it after the statute of limitations expired based upon the argument that he could not reasonably have "discovered" his injury until the final court decision.

In our view, both our hypothetical and the situation involved in this case do not truly involve a discovery rule issue. Rather, it appears that these situations are more closely analogous to the revival of claims issue confronted by Pennsylvania courts after enactment of statutory amendments which affect the statute of limitations applicable to certain tort claims. As noted in *Urland*, 822 F.2d at 1276, Pennsylvania courts have consistently held that an action barred by the statute of limitations cannot be revived by a subsequent change in statutory law. We believe that Pennsylvania courts would reach the same conclusion with respect to the revival of time-barred claims by subsequent court decisions.

[6] In addition to the remaining issues raised by the defendants in support of their motion for summary judgment, the Court discerns still another question, somewhat related to both the existence of an actionable injury and to *res judicata* concerns, as well as to the statute of limitations question.

Even if we were to assume that a cause of action once extinguished by the apparent elimination of the injury resulting from defendants' conduct can be reactivated and plaintiffs permitted a new, full limitations period within which to file suit on that claim if it later develops that the alleged injury still exists, there is here presented the question whether any claim which might have survived under these circumstances was once again extinguished by a still later event.

As noted, the Trustee ultimately settled Rimar's claims against CCBL, notwithstanding the summary judgment. The settlement was approved by the Bankruptcy Court and no appeal was taken from that order. Consequently, we see a substantial issue concerning the continued existence of the purportedly rejuvenated cause of action. Plaintiffs cannot accurately and reasonably claim that the Rimar cause of action was completely lost, since the bankruptcy estate benefitted, via a settlement, from the Trustee's involvement in Nagle I. Moreover, since the nature and extent of such benefit was not directly challenged by the plaintiffs in the Bankruptcy Court, *i.e.*, by pursuing objections to approval of the settlement by the court, it appears that plaintiffs cannot now attack the value of the settlement by means of this action for damages against the Trustee and his counsel on behalf of the Rimar bankruptcy estate. Thus, it further appears that the on-again, off-again injury which allegedly resulted from the Trustee's failure to timely file an action against CCBL was eliminated again as a result of the settlement of Nagle I.

2. Res Judicata/Collateral Estoppel

Defendants assert that plaintiffs are precluded from pursuing the instant action because all of the issues here involved were already decided in favor of the defendants in the Bankruptcy Court in connection with the motion of Rimar shareholders, the same parties who are the plaintiffs here, to remove the Trustee and his counsel.

To put this issue in perspective, we will briefly review the basis for this action and the basis for the motion in the Bankruptcy Court to remove the Trustee and his counsel.

Plaintiffs here allege that by their failure to timely file suit against CCBL, which ultimately resulted in the entry of summary judgment against CCBL on statute of limitations grounds, the Trustee and his counsel were negligent. Plaintiffs further allege that such negligence damaged the Rimar bankruptcy estate in that the opportunity to secure a potentially large asset, *viz.*, a substantial verdict and judgment in the case against CCBL, was lost to the estate.

Plaintiffs' reasons for requesting that the Bankruptcy Court remove the Trustee and his counsel, were likewise based upon the litigation by the Trustee against CCBL which resulted in judgment in favor of CCBL. The theory directly underlying the first removal application, however, was the contention that the bankruptcy estate had a cause of action against counsel to the Trustee identical to this case, *i.e.*, a negligence action for damages for failure to timely sue CCBL. The petitioners argued that the Trustee had an inherent conflict of interest in that his continued representation by attorneys who were the potential defendants in such an action by the estate assured that the asset represented by such an action, *viz.*, a substantial verdict and judgment against counsel to the Trustee, would not be pursued.

As noted, the first application to remove the Trustee was dismissed by the Bankruptcy Court as premature in light of the filing of the instant action by plaintiffs shortly before seeking to have the Trustee removed. When the Trustee later sought to compromise the actions he had filed against Martin, Martin's counsel and Rimar's pre-bankruptcy counsel, in which counsel to the Trustee had likewise been sued as third-party defendants, the Rimar shareholders renewed their request to have the Trustee and his counsel removed, contending that the settlement was not in the best interests of the estate and had been proposed, in essence, to benefit counsel to the Trustee. The petitioners also reiterated their argument that they could not rely upon the Trustee to pursue an action against his counsel for losing the CCBL claim.

It was the later application to remove the Trustee and his counsel which resulted in the appointment of special counsel to investigate the matter and advise the Bankruptcy Court, the court's acceptance of the recommendation of special counsel that the application be denied, and the subsequent appeals to this Court and to the Court of Appeals, which affirmed the decision of the Bankruptcy Court.

Plaintiffs' arguments in opposition to defendants' contentions that further litigation concerning the conduct of the Trustee and his counsel with respect to the estate's claims against CCBL is precluded by the prior bankruptcy appeal are based upon the fundamental misconception that *res judicata*, or claim preclusion, is the only legal principle applicable to the substance of defendants' contentions. Moreover, it appears that plaintiffs do not appreciate the true implications of our conclusion in the bankruptcy appeal case that the Trustee's conduct was proper.

In other words, although plaintiffs may be technically correct in asserting that claim preclusion is not here applicable, and although the issues which plaintiffs raised as their asserted basis for removing the Trustee may have differed somewhat from the substantive basis for our decision in the bankruptcy appeal case, these circumstances do not affect the essential correctness of defendants' position regarding preclusion.

To explain this conclusion, we will first review and contrast the elements of *res judicata*, the term used by defendants to describe their position, and collateral estoppel, the principle which we find applicable to this case. These principles are now more properly designated claim preclusion and issue preclusion, respectively.

Under Pennsylvania law, four conditions are required for proper application of claim preclusion: (1) identity of subject matter; (2) identity of cause of action; (3) identity of persons and parties to the action; (4) identity of quality or capacity of the parties suing or sued. *Gregory v. Chehi*, 843 F.2d 111 (3rd Cir. 1988). It appears that at least two of these criteria, identity of subject matter and parties, are easily met in this matter, since the essence of the injury asserted in both the Bankruptcy Court appeal and in this case is the failure of defendants to act in the best interest of the estate, and both plaintiffs and defendants are the same. Whether the remaining criteria are met, however, is somewhat problematical. In the first instance, this is a direct action for damages, while the relief sought in connection with the Bankruptcy Court application for removal was more equitable in nature, notwithstanding the possibility of additional action by the estate if the plaintiffs had succeeded in removing the Trustee and his counsel. Thus, it is not completely clear whether there is true identity of the causes of action. Similarly, because this is an action for damages, there

is a question whether the capacity of the defendants in this action is identical to their capacity in the bankruptcy appeal.

We need not work through the analyses which would be required to determine if claim preclusion is here applicable, however since the related principle of issue preclusion does clearly apply. There are likewise four criteria which must be met in order to conclude that the instant case involves an attempt to relitigate previously decided issues: (1) the issue decided in the prior case is identical to the issue here presented; (2) the prior case resulted in a final judgment on the merits; (3) the party or parties against whom preclusion is asserted was a party to the prior action or in privity with such party; (4) the party or parties against whom preclusion is asserted had a full and fair opportunity to litigate the issue in question in the prior action. *Id.; Shuder v. McDonald's Corp.*, 859 F.2d 266 (3d Cir. 1988).

In fact, more than one of the issues presented by this case were fully and finally adjudicated in connection with the appeal resulting from the Bankruptcy Court's decision not to remove the Trustee and his counsel from the Rimar case. Moreover, an earlier decision by the Bankruptcy Court likewise has a preclusive effect on an essential issue in this case.

With respect to injury or damage, an essential element of plaintiffs' claim for negligence, we previously alluded to a potential problem which may adversely affect plaintiffs' ability to pursue the present action, *i.e.*, the Trustee's settlement of the claims against CCBL after summary judgment was entered in favor of CCBL, which plaintiffs failed to challenge in the Bankruptcy Court. (*See*, n. 6, *supra*). That discussion referred to the likely effect upon this case of the Bankruptcy Court's approval of the Trustee's application to settle with CCBL. Although the application for approval of the settlement ap-

pears not to have received any attention from the Rimar shareholders, who were otherwise so diligent in monitoring the Trustee's efforts to gather assets for the estate, full analysis of the settlement issue in the context of the action taken by the Bankruptcy Court establishes, in itself, that plaintiffs are not here permitted to relitigate the issue of injury or damage to the estate, since they did not then and there object to or appeal the order approving settlement of the estate's claims against CCBL.[7]

Plaintiffs recognize, as illustrated by their arguments in response to defendants' statute of limitations contentions, that damage to the estate is an essential element of plaintiffs' claims against the defendants in this derivative action. The Bankruptcy Court's approval of the settlement of the estate's claims against CCBL proposed by the Trustee serves as a judicial determination that the settlement was both reasonable and a benefit to the estate. Thus, by bringing the case against CCBL to a successful conclusion, the Trustee eliminated any damage which might have resulted from his failure to file the Rimar estate's claims against CCBL before expiration of the statute of limitations. We conclude, therefore, that the first issue preclusion element, identity of issue, is satisfied with respect to the injury element of plaintiffs' cause of action.

Plaintiffs' failure to pursue any objections they might have had to that settlement in the Bankruptcy Court renders the approval order a final judgment on the merits of that issue, *i.e.*, whether the estate was damaged, which meets the second preclusion criterion. Since the plaintiffs in this action were

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[7] On the record presently before the Court, which does not include the docket of the bankruptcy case, it is unclear whether the plaintiffs objected to the settlement proposed by the Trustee, but it is clear that no appeal was taken from the order approving that settlement.

consistently interested parties in the bankruptcy case, who vigorously pursued objections to the Trustee's decisions with respect to litigation or potential litigation against CCBL when they believed the Trustee was neglecting or otherwise not properly pursuing legal action, we further conclude that the third and fourth preclusion elements are met with respect to this issue. The record reveals that the Rimar shareholders, who are creditors in the bankruptcy case as well as plaintiffs in this action, were always afforded ample opportunity to be heard in the Bankruptcy Court in connection with their efforts to assist the Trustee in maximizing the value of estate assets. There is no reason, therefore, that they could not have fully litigated the issue of the reasonableness of the settlement with CCBL when it arose in the bankruptcy case via the Trustee's application to the Bankruptcy Court for approval of the settlement.

In addition, although the question of damage to the estate resulting from the judgment entered in favor of CCBL on statute of limitations grounds was once determined by the Bankruptcy Court in connection with approval of the settlement, albeit indirectly, the entire issue was then reexamined in both the Bankruptcy Court and in this Court in connection with the plaintiffs' application to remove the Trustee.

In discussing the Trustee's handling of the case against CCBL, we concluded that, "[T]he estate *benefitted by approximately $200,000 from the settlement in the Trustee's suit against CCBL* when CCBL relinquished its claims against the estate. *This settlement was reached despite the fact that CCBL had already obtained summary judgment in its favor in the case in the trial court.*" (Slip op. at 8) (Emphasis added).

We further concluded that "the Trustee pursued the claims of the estate diligently and sought to minimize expenses

while attempting to collect and preserve assets of the estate." (*Id.*, at 9).

Thus, it is clear that the issue whether the estate was injured, as well as the issue whether the Trustee was negligent, were considered and decided in favor of the defendants in connection with our order denying the appeal from the Bankruptcy Court's denial of the application to remove the Trustee.

In determining whether the Bankruptcy Court erred in declining to remove the Trustee, this Court properly and necessarily assessed the Trustee's conduct with respect to the CCBL litigation in terms of its impact upon the Rimar estate. Our conclusion that the estate benefitted from the Trustee's involvement in the litigation against CCBL by the settlement thereof stands as a judicial determination that any potential injury to the estate resulting from the Trustee's inability to fully litigate the case against CCBL, due to his failure to commence an action himself and/or the untimeliness of his entry into the ongoing case, was negated by his successful resolution of the claims against CCBL.

The question whether the Trustee breached his duty of reasonable care to the estate is, of course, the central issue in the instant case. Our prior examination of the Trustee's actions, however, resulted in the determination that, on the contrary, he ultimately fulfilled his duty of care by pursuing the case against CCBL.

Thus, two essential elements of plaintiffs' claim in this case are identical to issues considered and decided by this Court in a prior case, the bankruptcy appeal. The same parties who are plaintiffs in this case were the petitioners seeking the Trustee's removal in the Bankruptcy Court and, therefore, plaintiffs in the appeal. Since our decision on the appeal was affirmed by the Court of Appeals, by judgment order alone,

there is a final judgment which encompasses the issue of the Trustee's fulfillment of his duty of care toward the estate with respect to its claims against CCBL and the issue whether the estate was damaged by the summary judgment entered in favor of CCBL. The Trustee's actions with respect to the estate's claims against CCBL was the ultimate basis for the plaintiffs' petition to remove the Trustee; our conclusion that his actions were proper in all respects was the clear basis for our affirmance of the Bankruptcy Court; the plaintiffs appealed that order, and necessarily, the reasons on which it rested. Plaintiffs, therefore, not only had, but fully pursued, a fair opportunity to litigate the issues whether the Trustee was negligent and whether the estate was damaged by the ultimate result of the case against CCBL.

Consequently, we conclude that the defendants are correct in their contention that the primary liability issue in this case, *i.e,* whether the Trustee and/or his counsel breached their duty of care to the Rimar estate by failing to timely file an action against CCBL was decided in their favor in a prior action. In the first instance, the Trustee and his counsel did not completely lose the opportunity to pursue the estate's claims against CCBL. The Trustee was substituted for the plaintiffs in an action already pending against CCBL which they had commenced. Although the Trustee's action was subsequently terminated by a summary judgment in favor of CCBL based upon the trial court's conclusion that his entry into the case was untimely, our conclusion that the Trustee nevertheless obtained a favorable result in the litigation via a settlement which conferred a $200,000 benefit on the estate operates as a decision on the merits of the plaintiffs' claim in this case that entry of the judgment established that the Trustee was negligent and that the estate was thereby damaged.

Moreover, just as the Bankruptcy Court's approval of the settlement with CCBL indirectly adjudicated, as a separate and distinct issue, the question whether the estate was damaged by the Trustee's failure to timely assert the Rimar estate's claims against CCBL, our explicit consideration of that issue in the bankruptcy appeal by the same plaintiffs resulted in a direct and specific determination that the estate suffered no injury since the litigation against CCBL resulted in a net gain for the estate, not a loss. The issue of the value to the estate of the CCBL settlement was available as a basis for the subsequent appeal of our order, and, indeed, the appeal taken from our order presumably included all of the reasons upon which the order was based. The affirmance of our order, therefore, forecloses relitigation of the issue whether the Rimar estate suffered a loss resulting from the inability of the Trustee to pursue Rimar's claims against CCBL through a trial on the merits because of the untimeliness of asserting the estate's claims against CCBL.

3. Standing

In light of the foregoing discussions of the statute of limitations and issue preclusion questions, which provide separate and independent bases for judgment in favor of the defendants, a discussion of plaintiffs' standing to pursue this action seems superfluous. Nevertheless, we will briefly address the issue for the sake of completeness.

Defendants argue that any action on behalf of the estate properly belongs to the Trustee alone, and may not be pursued by a class of creditors such as the plaintiff shareholders here. Plaintiffs counter that by failing to institute an action for malpractice against his counsel prior to expiration of the statute of limitations, and, moreover, by arguing in support of his motion for summary judgment that the statute of limitations

has expired on the plaintiffs' claims in this action, the Trustee has effectively abandoned this asset of the estate, leaving plaintiffs free to pursue it.

Thus, by reference to the defendants' arguments in support of summary judgment, plaintiffs attempt to avoid the procedural difficulties inherent in their status as shareholder/creditors pursuing a cause of action which, ordinarily, could be asserted only by the Trustee on behalf of the debtor corporation's estate. On the same basis, plaintiffs likewise attempt to avoid the requirement that they prove an explicit intention on the part of the Trustee to abandon an asset, which would ordinarily be necessary to support a Court determination that their claim is an such an abandoned asset. Specifically, plaintiffs argue that the Trustee's position that plaintiffs' claims are barred by the statute of limitations must be considered his abandonment of the estate's claims, since he obviously believes that he cannot pursue the action.

Whatever the objective legal merits of this constructive abandonment argument in a proper case, upon which we make no comment, it is here unavailing. Our decisions on the other issues in this case confirms the contention of the Trustee and the other defendants that there is no viable asset of the estate for the Trustee to pursue. Since, as noted previously herein, as well as in our prior opinion in the bankruptcy appeal case, the Trustee successfully pursued the estate's claims against CCBL, a claim against his counsel for failing to timely commence an action against CCBL either never ripened in the first instance, or was later extinguished. Consequently, we cannot determine that the Trustee abandoned an asset of the estate by failing to institute and pursue an action against his counsel, and further permit plaintiffs to pursue it, since such asset does not presently exist.

We conclude, therefore, that whether expressed in terms of a lack of standing or otherwise, the plaintiffs have no right to maintain this action.

SUMMARY

Having concluded that the instant action is barred by the statute of limitations and issue preclusion principles, and, in addition, that the plaintiffs have no legally cognizable claims to pursue in a derivative action on behalf of the Rimar estate, we will grant the motions of all defendants for summary judgment. In addition, we will order that the case be removed from the civil suspense docket and terminated by virtue of the judgment to be entered in favor of the defendants.

FILED Aug. 3, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 88-9048

IN RE: RIMAR MANUFACTURING, INC.
PIER 7, INC.

TROUTMAN, S.J.

MEMORANDUM

The above-captioned case is an appeal from an order of the Bankruptcy Court, (1) denying an application to remove the Trustee in Bankruptcy, David Alspach, and his counsel, attorneys Jacques Geisenberger and Marvin Krasny and (2) approving a $20,000 settlement of two cases filed by Alspach on behalf the the estate.[1] In addition, there is pending in this action a motion to intervene in the portion of the appeal relating to the approval of the settlements. Said motion was filed by attorneys Geisenberger and Krasny, defendants in CA #85-685, also pending in this Court, as well as by attorneys Allen Fellheimer & Paul Rosen, third-party defendants in that

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[1] In addition to the above-captioned case, there are also pending before this Court CA# 82-184, *David Alspach, Esq., T/B of Pier 7, Inc. and Rimar Manufacturing Company v. Paul R. Rosen, et al.* CA # 82-185, *David Alspach, Esq., T/B of Pier 7, Inc. and Rimar Manufacturing Company v. Robert I. Martin, et al.*, and CA# 85-645, *Mary Nagle, et al. v. David Alspach, et al.*

The approval of the settlement of CA## 82-184 and 82-185 by the Bankruptcy Court is one of the issues on appeal in the instant case. The remaining case, CA# 85-645, presently in civil suspense, will proceed now that the Bankruptcy appeal will be decided by the order accompanying this Memorandum.

case.[2] Geisenberger & Krasny are, of course, already parties to the portion of the appeal relating to the application to remove the Trustee and his counsel, since they are said counsel.

Although the procedural posture of the case we are here reviewing and the various related cases may appear to be unusually tortured and convoluted, the story underlying all of these cases is still more complicated.

Nearly twenty years ago, Robert Martin, founder and principal shareholder of Rimar and its wholly-owned subsidiary, Pier 7, (Rimar), was operating the businesses, at least in part, through loans extended by Commercial Credit Business Loans, Inc. (CCBL). For reasons not relevant to the cases presently pending, it appears that the business relationship between CCBL and Martin deteriorated. It has been alleged that CCBL thereafter sought to force Rimar into bankruptcy, and succeeded in doing so.

Subsequently, there was a lawsuit involving Martin and CCBL which was settled by a stipulation setting forth certain rights on the part of Martin and Rimar and certain duties on the part of CCBL. Later, however, additional problems arose, resulting in a lawsuit by CCBL against Martin to recover on a personal guarantee of loans extended to Rimar. Martin, a party to the stipulation ending the first lawsuit, counterclaimed against CCBL, alleging that it deliberately and tortiously vio-

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[2] The third-party complaint in CA #85-645 was filed by Alspach the Trustee in Bankruptcy, who alleges that the attorney defendants failed to notify the Trustee of a potential asset of the estate. *i.e.*, a lawsuit filed by Commercial Credit Business Loans, the principal lender to Rimar, the bankrupt corporation, against Robert Martin, founder and principal shareholder of Rimar. This claim is identical to the claims asserted by the Trustee in CA## 82-184 and 82-185, the settlement of which was approved by the Bankruptcy Court and is one of the issues in this case.

lated the stipulation of settlement of the original suit with the specific purpose, intent and effect of injuring him.

Trial on that case was held before another judge in this district in 1979. The jury returned a verdict in favor of Martin, both in the main case and on the counterclaim, there awarding him five million dollars. However, upon motion of CCBL for a new trial, the judge considered the pervasive misconduct of Martin's trial counsel and ruled that the jury could not possibly have reached its decision unaffected by his conduct. Hence, a new trial was ordered and the case was subsequently settled and the record sealed. Nevertheless, Geisenberger obtained, and sent to the Bankruptcy judge, a copy of testimony by Martin in another case in which he revealed the amount he received for the settlement of his counterclaim. (Record, at 80). The amount disclosed therein is considerably less than the amount awarded by the jury, but considerably more than the $20,000 settlement proposed for the cases brought by the Trustee against Martin, Rosen and the other defendants on behalf of the Rimar estate.

While the lawsuit involving Martin and CCBL was proceeding to a resolution which was apparently favorable to Martin, Rimar was simultaneously involved in the bankruptcy proceedings which were allegedly precipitated by CCBL, the petition having been filed in 1976. David Alspach had been appointed Trustee, with attorneys Geisenberger and Krasny as his counsel. Martin, as a principal, was represented by attorney Rosen, who was his trial counsel in the suit with CCBL. Rimar was represented by Allen Fellheimer and Don Harrison, an associate of Fellheimer.

Since CCBL was a principal creditor of Rimar, the Trustee subsequently entered into a stipulation regarding payments by the estate to CCBL, and in connection therewith,

acknowledged the validity of CCBL's security interests in certain Rimar property, consented to relief from the automatic stay to allow CCBL to proceed against Rimar property and agreed to turn other estate assets over to CCBL. Although the case of CCBL v. Martin, including the counterclaim, was already pending when the schedule of debts, claims, assets, statement of the case, etc. were filed, and when the foregoing decisions were made regarding CCBL and the estate, the Trustee later alleged that nothing about the lawsuit between Martin and CCBL, including the counterclaim, appeared on any of those documents.

After the favorable counterclaim verdict in the CCBL v. Martin case, it appears that there were discussions among the lawyers involved in the various pending suits and the Trustee, regarding the possibility of the Trustee filing a suit, similar to Martin's counterclaim against CCBL, on behalf of Rimar and the estate. (*See*, generally, Transcript of Hearing of April 7, 1986). Discussions regarding that proposed action apparently continued through 1980 and up until about May, 1981. In the course thereof, the lawyers and the Trustee became convinced that the statute of limitations on the potential Rimar claim against CCBL would run on or about January 12, 1982. (*Id.*).

In May, 1981, the Trustee applied to the Bankruptcy court for permission to file suit against Martin, Rosen and Fellheimer, as well as against CCBL. (Record, at 237). The theory under which the Trustee subsequently sued Martin, Rosen and Fellheimer, in CA ##82-184 and 82-185, was that the defendants in those cases had failed to apprise the Trustee of the pendency of the CCBL v. Martin action and the counterclaim in time to intervene in that case on behalf of Rimar, and before he entered into a stipulation regarding the settle-

ment of Rimar's debts to CCBL. (*See, e.g.,* Complaint in CA# 82-185).

The Trustee's application to the Bankruptcy Court for leave to sue CCBL noted the theory underlying Martin's successful counterclaim, *i.e.,* a claim against CCBL for violation of the stipulation of settlement of the original lawsuit in which Rimar, as well as Martin were parties. As his basis for believing he had a cause of action against CCBL, however, the Trustee asserted that CCBL committed a fraud on the Trustee by failing to apprise him of the facts underlying the Martin counterclaim and his possible right to intervene therein. It does not appear that he was seeking to sue CCBL on the same theory upon which Martin's counterclaim was based, *i.e.,* that CCBL had tortiously breached its prior settlement agreement with Rimar. (Record, at 250).

The actual theory underlying the Trustee's subsequent suit against CCBL is not entirely clear. It is clear, however, that the Trustee's suit against CCBL was not a new action. After his application to sue CCBL was approved by the Bankruptcy Court, the Trustee became involved in a case already pending against CCBL, which had originally been filed by Mary Nagle, one of the appellants in this case. The trial court in that case granted the Trustee's motion to intervene and to be substituted as plaintiff. Subsequently, the Trustee applied to the Bankruptcy Court for permission to compromise that claim. (Record, at 159-162). Noting the granting of a new trial in the case in which Martin had received his counterclaim award and the grant of summary judgment in favor of CCBL in his own case, which was on appeal, the Trustee concluded that settlement of the case was in the best interests of the estate. As a result of the settlement, CCBL withdrew its claim against Rimar in the Bankruptcy proceedings in full settlement of any claims

Rimar had against CCBL. The compromise was approved by the Bankruptcy Court on March 14, 1985, and was not appealed. (Record, at 149).

After the compromise of the CCBL action was approved, after commencement of the lawsuits now on this Court's docket at 82-184 and 82-185, and after commencement of suit by creditors and/or shareholders of Rimar, on this Court's docket at 85-685, two applications to remove the Trustee were filed in the instant case. One such application was filed by Fellheimer and was denied as premature. The second application was later filed by the creditors/shareholders who are plaintiffs in 85-645 and appellants here. The denial of the second application is, of course one of the issues before the Court on this appeal.

Before ruling on either the application to remove the Trustee or on the Trustee's application to approve the settlement of CA## 82-184 and 82-185, the Bankruptcy Court appointed special counsel to assess the merits of the proposed settlement.

Independent counsel produced a report which confirmed the opinion of the Trustee and likewise supported the settlement of both cases for the amount proposed. Thereafter, the report and recommendation of special counsel was adopted by the Bankruptcy Court and settlement of the two cases was approved, (Record, at 122), providing the other issue in this appeal.

Having thus set forth the factual and procedural history of the ongoing litigation, the Court can now address the issues presented in the appeal from the order of the Bankruptcy Court. We will first consider the approval of the settlements of the two 1982 cases filed by the Trustee.

The report of the special counsel (Record, at 62) provides ample support for approval of the settlements. As noted, the gravamen of the complaints in the cases which the Trustee proposes to settle are that the defendants therein failed to notify the Trustee that CCBL had sued Martin and that Martin had filed a counterclaim against CCBL which involved allegations that CCBL breached a prior settlement agreement to which Rimar, as well as Martin, was a party. Special counsel concluded, however, that the Trustee had actual notice of the counterclaim verdict in favor of Martin before the statute of limitations expired on a similar claim by Rimar against CCBL. Therefore, any failure on the part of Martin and Rosen to apprise the trustee of a potential claim on behalf of the Rimar estate by listing such potential claim on the schedule of assets submitted to him in connection with the bankruptcy was *de minimis*. In addition, the report of counsel sets forth a litany of difficulties, with attendant expenses likely to burden the estate, which the Trustee would face if he pursued the claims to a trial, as well as the uncertainty of obtaining a judgment at all, much less in excess of the proposed settlement amount. Moreover, the counterclaim verdict of which the Trustee was allegedly not informed by the defendants was subsequently overturned because the trial judge was convinced that the verdict was affected by the conduct of Martin's counsel, Rosen. In other words, the trial judge determined that the verdict might not have been favorable to Martin absent such conduct. It is not likely that there would have been a suit against the defendants for failure to disclose a potential claim if the same claim, brought by another party, was unsuccessful at trial. Finally, the estate benefitted by approximately $200,000 from the settlement in the Trustee's suit against CCBL when CCBL relinquished its claims against the estate. This settlement was

reached despite the fact that CCBL had already obtained summary judgment in its favor in the case in the trial court.

In light of the ultimate result of Martin's counterclaim case aginst CCBL, as well as the favorable settlement in the case against CCBL, it is doubtful that any additional relief could have been obtained against CCBL if the Trustee had been informed of the counterclaim by the defendants in CA## 82-184 and 82-185 and had actually intervened in the counterclaim case. Moreover, in light of the problems inherent in pursuing the 1982 cases and the questionable claims involved therein, it is clear that the Trustee, special counsel appointed by the Bankruptcy Court, and the Bankruptcy Court were all quite correct in recommending and approving the settlement of those cases.

Moreover, it follows from this Court's agreement with the approval of the settlement that we are likewise in agreement with the Bankruptcy Court's conclusion that the Trustee acted in the best interests of the estate in this matter. We conclude that the Trustee pursued the claims of the estate diligently and sought to minimize expenses while attempting to collect and preserve assets of the estate.

Consequently, this Court will affirm the order of the Bankruptcy Court.

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FILED Aug. 29, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:

RIMAR MANUFACTURING, INC.,

Debtor

CASE NO. 76-69 TT

PIER 7, INC.

Debtor

CASE NO. 76-68 TT

REPORT OF SPECIAL COUNSEL

I. CHRONOLOGY OF EVENTS

DATE	EVENT
1/12/76	Chapter XI Petition filed. Debtor-in-Possession. Counsel for Debtor is Fellheimer firm.
1/15/76	Complaint By Commercial Credit Business Loans ("CCBL") filed—Reclamation.
1/19/76	Hearing held on CCBL complaint. Adjourned to 1/30/76.
3/4/76	Continued hearing held. David Alspach elected Trustee. Rimar consents to adjudication.
3/18/76	Complaint by CCBL vs. Martin (E.D. Pa.)

3/19/76	Complaint by CCBL vs. Rimar (Bkcy. Ct.)
3/25/76	Stipulation between CCBL and Trustee Order entered approving same.
7/7/76	Motion under Rule 220 by Trustee. Hearing held on 8/11/76.
9/7/76	Martin counterclaim filed. (E.D. Pa.)
7/15/77	Order entered on Rule 220 Application

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IV. DISCUSSION REGARDING REMOVAL OF TRUSTEE

Under the Bankruptcy Act of 1898, former Title 11, U.S.C., the Court could remove a Trustee "for cause", 2(a)(17). This section should be read in conjunction with 44 which set forth grounds for removal of a trustee.

Removal of a trustee was not favored as it disturbs the administration of the estate. Colliers, 14th ed., 44.19. Misconduct in office was the usual cause for removal. *Id.*

Trustees can be removed from office for refusing or delaying the institution of suits. *Id.* This would seem to be the only ground for removal in this case and will be the only matter discussed in this Report.

If a trustee has unduly delayed the commencement of appropriate litigation, he should be removed. *In re Cass & Deley Shoe Co.* 31 F. 2d 405 (1st Cir. 1929). Trustees are officers of the Court and the Court has the duty to oversee the efficient administration of the estate. *Id.*

The Trustee represents all creditors and is required to press meritorious claims. *In re Honesdale Union Stamp Shoe Co.*, 102 F.2d 372 (3d Cir. 1939). If the Trustee fails to press the claim the Court may direct him to proceed, or, if the Trustee fails to do so, to remove him or to allow a creditor to act in the Trustee's name. *Id.* See, also, *In re Abingdon Realty Corp.*, 21 B.R. 290 (Bkcy. E.D. Va. 1982).

In the case at bench, we are confronted with the situation where the creditor did not secure leave of Court prior to commencement of litigation nor did the creditors come to this Court and request the Court to: order the Trustee to proceed, remove the Trustee, or allow them to proceed in the Trustee's name until after the applicable statute of limitations passed.

In this case, there is no evidence that the Trustee himself unduly delayed the commencement of litigation. Rather the Trustee understood litigation would be commenced by counsel. N.T. 4/7/86, pp. 4-29.

The objector have not come before this Court in a timely fashion insofar, as the claims against the Defendants area• concerned. If there is a claim of the estate to be pursued against other parties, the objector should formally bring this matter before the Court with an appropriate application.

/s/ Kurt Althouse, Esquire
Kurt Althouse, Esquire for
BINGAMAN, HESS, COBLENTZ &
BELL
660 Penn Square Center
601 Penn Street
P.O. Box 61
Reading, PA 19603

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:
RIMAR MANUFACTURING, INC.,
Debtor
Case No. 76-69 TT

PIER 7, INC.,
Debtor
Case No. 76-68 TT

ORDER

AND NOW, this 29th day of August, 1988, it is ORDERED that:

(1) The Report and Recommendations of Kurt Althouse, Esquire, Special Counsel to the Trustee, are hereby APPROVED and ADOPTED as Findings of Fact and Conclusions of Law of this Court;

(2) The Court has independently reached the same Findings and Conclusions (as Special Counsel) with respect to the:

(a) The Application Pursuant to 11 U.S.C. Section 324 For Removal of Trustee and His Counsel filed on February 12, 1986 and

(b) Trustee's Motion for Approval of Settlement;

(3) The Application Pursuant To 11 U.S.C. Section 324 For Removal of Trustee and His Counsel filed on February 12, 1986 is DENIED;

(4) The Motion of Trustee for Approval of Settlement is GRANTED in the best interests of the estate.

Reading, PA

/s/THOMAS M. TWARDOWSKI
Bankruptcy Judge

FILED July 10, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-0046

DAVID E. ALSPACH, Trustee in Bankruptcy of Rimar Mfg., Inc. and Pier 7, Inc.,

Plaintiff

v.

COMMERCIAL CREDIT BUSINESS LOANS, INC.,

Defendant

OPINION

CAHN, J., July 9, 1984

Plaintiff David E. Alspach, trustee in bankruptcy of Rimar Manufacturing, Inc. (Rimar) and Pier 7, Inc. (Pier 7), brings this action on behalf of Rimar and Pier 7 against Commercial Credit Business Loans (CCBL) for breach of a Stipulation and Order entered in this court on September 12, 1975.[1] Before me is the motion of defendant CCBL to dismiss the complaint, or in the alternative, for summary judgment. I find that the trustee's action is barred by the applicable statute of limitations, and for that reason summary judgment will be granted to defendant.

I. Facts

This action was originally brought by a class of shareholders of Rimar, asserting claims on behalf of Rimar against CCBL, a commercial lender. In 1973 CCBL extended several million dollars in credit to Rimar and to Pier 7, Rimar's wholly

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[1] *See* Rimar Mfg., Inc., et al. v. Commercial Credit Business Loans, Inc., et al., No. 75-2516 (E.D. Pa. 1975).

owned subsidiary. Robert Martin, the owner of Rimar, personally guaranteed these loans. In September of 1975, Rimar instituted suit in this court against CCBL in regard to termination of the line of credit. The litigation was settled by a Stipulation and Order of September 12, 1975, in which CCBL agreed to continue to extend credit for a four-month period while Rimar sought alternative financing. Rimar then negotiated with Aetna Business Loans, Inc., and at the close of the four-month period requested an additional extension of time from CCBL to close an agreement with Aetna. CCBL refused to extend time, and on January 12, 1976, Rimar and Pier 7 filed petitions in bankruptcy. Shortly thereafter, CCBL filed suit against Robert Martin to collect on his personal guarantee of the corporate debt. Commercial Credit Business Loans, Inc. v. Martin, Civil Action No. 76-812 (hereinafter "the Martin litigation"). Martin filed a counterclaim against CCBL, asserting claims arising out of an alleged breach by CCBL of the September, 1975, Stipulation. In December of 1979, a jury returned a verdict in the Martin litigation against CCBL, and for Martin on the counterclaim, in the amount of five million dollars.[2] Six days prior to the expiration of the statute of limitations on the claim of breach of the 1975 Stipulation and Order,[3] the shareholders of Rimar filed suit against CCBL,[4] asserting the same claims on behalf of Rimar that Robert Martin had raised in his counterclaim in the Martin litigation.

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[2] This judgment was vacated on January 10, 1984.

[3] The parties do not appear to dispute the application of the six-year statute of limitations found in 42 Pa. Cons. Stat. Ann. §5527 to the claim for breach of contract. The statute in this case began to run on January 12, 1976, and the shareholders' complaint was filed on January 6, 1982.

[4] Other defendants named in the complaint, officers of CCBL, were never served with process, and the claims against them therefore were dismissed by order of this court dated August 2, 1982.

Following the filing of defendant's motion to dismiss the complaint, the trustee in bankruptcy of Rimar and Pier 7, David Alspach, moved to intervene, and the plaintiff-shareholders moved to join the trustee as party plaintiff. Defendant CCBL opposed both of these motions. In an opinion and order dated October 19, 1983, the claims of the shareholders were dismissed as properly residing only with the corporation or its trustee in bankruptcy; the trustee in bankruptcy was joined as the real party in interest; and the trustee's claims, otherwise untimely filed,[5] were allowed to "relate back" to the date the shareholders' complaint was filed. *See* Fed. R. Civ. P. 17(a). The trustee then filed an amended complaint. Defendant has moved to dismiss this complaint, or for summary judgment, on the grounds that the statute of limitations bars the action. Defendant also argues that prior proceedings in the bankruptcy court operate to bar the trustee's claims on res judicata or collateral estoppel grounds.

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[5] As an action pre-existing the October 1, 1979, effective date of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, the prior Bankruptcy Act of 1898 and applicable rules govern the proceedings. *See* §403(a), Bankruptcy Reform Act of 1978, 11 U.S.C. *prec.* §101 (1982); Central Trust Co. v. Official Creditors' Comm. of Geiger Enterprises, Inc., 454 U.S. 354 (1982). Under §11e of the Bankruptcy Act, 11 U.S.C. §29e (1976 ed.), when the debtor's cause of action arises under state law and the applicable state statute of limitations period expires more than two years following the date the debtor is adjudicated a bankrupt, as in this case, the state period of limitations applies. *See* 1A *Collier on Bankruptcy* ¶11.13, at 1217 (14th ed. 1974). Section 11e provided, in pertinent part:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. ...

Here, the statute of limitations period expired on January 12, 1982, *see supra* note 3, and the shareholders moved to join the trustee as the real party in interest on May 24, 1982, over four months after the statute had run.

II. Discussion

Counsel for CCBL has submitted several affidavits in support of summary judgment, together with parts of the record of the bankruptcy court in the Rimar bankruptcy proceeding. The record reveals that in May of 1981 the trustee sought, and was granted, leave from the bankruptcy court to commence an action against CCBL on the claim of breach of the 1975 Stipulation. The trustee did not file suit, however.

Following the expiration of the statute of limitations on this claim, counsel for Rimar filed an action in the bankruptcy court urging removal of the trustee, based, *inter alia*, upon the trustee's failure to institute suit against CCBL. In the bankruptcy proceeding, counsel for Rimar asserted that he contacted the trustee immediately following the jury verdict in the Martin litigation to ascertain what action the trustee would take to protect any similar claim by Rimar. Following a conference with the bankruptcy judge and a meeting with counsel for Rimar, the trustee agreed that a claim existed and that the statute of limitations would expire in approximately two years. The trustee took no action in this regard, however, until April 12, 1982, more than three months after the expiration of the statute, when he moved to intervene in the shareholder action in this court. Counsel for the trustee does not take issue with this sequence of events; he merely asserts that the trustee had no actual knowledge of the viability of a claim by Rimar against CCBL until the jury verdict in the Martin litigation. It is beyond dispute, however, that the statute began to run at the time Rimar should have known of the existence of a claim against CCBL arising out of the breach of the 1975 Stipulation. *See supra* note 5. Rimar should have known that a claim existed at the time the Stipulation was allegedly breached, *i.e.*, on or before January 12, 1976. The trustee alleges no facts, such as

fraud, that would toll the running of the statute in this case, *see, e.g., Dabney v. Levy,* 191 F.2d 201 (2d Cir.), *cert. denied,* 342 U.S. 887 (1951). It appears manifestly unjust to CCBL to allow the trustee's action to go forward when the trustee had actual knowledge of the viability of Rimar's cause of action more than two years prior to the expiration of the statute, was urged to bring suit, sought leave from the bankruptcy court to institute proceedings against CCBL, and yet deliberately sat on his rights until the limitations period had expired.

Counsel for the trustee argues that consideration of the statute of limitations issue is barred by the prior opinion in this case permitting the trustee's claims to "relate back" to the date the shareholders' action was filed. Counsel's position might have merit if this were a case in which the statute of limitations issue was apparent from the face of the complaint, and defendant was therefore given notice of the existence of this defense and a fair opportunity to raise it, either by way of an answer or a motion to dismiss.[6] In this case, however, CCBL's original motion to dismiss was filed before it had notice of any claim by the trustee. The defendant was not given a fair opportunity to respond to a clearly articulated claim by the trustee until the filing of the trustee's complaint. Reconsideration of the statute of limitations issue by this court, based on a fuller record, is

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[6] The statute of limitations is an affirmative defense normally raised in an answer, *see* Fed. R. Civ. P. 8(c), but it may be raised in a motion to dismiss or for summary judgment when it is apparent from the complaint's statement of the claim that the statute has run. *See* Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir. 1 978); Hanna v. United States of America Veterans' Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir. 1975).

therefore now appropriate.[7] I conclude that the action is time-barred. Summary judgment will therefore be granted to defendant.

BY THE COURT:
/s/Edward N. Cahn, J.

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[7] Defendant also argues that certain litigation between CCBL and the trustee in the bankruptcy court regarding the lifting of the automatic stay, and the recovery of CCBL's collateral, operates to bar the present action, since the trustee's present claim should have been brought as a compulsory counterclaim in the bankruptcy court proceeding. Because I conclude that this action is barred by the relevant statute of limitations, I need not consider this issue. I note, however, that although the compulsory counterclaim rule applicable to district court proceedings, Fed. R. Civ. P. 13(a), was made applicable to bankruptcy proceedings by former Bankruptcy Rule 713, that Rule provided:

> Rule 13 of the Federal Rules of Civil Procedure applies in adversary proceedings, *except that* ... (3) when a trustee or receiver fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, he may by leave of court set up the omitted counterclaim ... by commencing a new adversary proceeding or separate action. ... [emphasis added).

Thus, even if the trustee's present cause of action arose out of the "same transaction" as CCBL's petition for relief from the automatic stay and therefore falls under the compulsory counterclaim rule, an issue I do not decide, the case law cited by counsel for CCBL requiring strict application of that rule in nonbankruptcy actions in the district courts is inapposite here.

*Errata in original.